SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. ~~802~~ 93

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO,
Petitioner,

against

EMPRESA HONDURENA DE VAPORES, S.A.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

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IN THE

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No. .....

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO,

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against

EMPRESA HONDURENA DE VAPORES, S.A.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Opinions Below.

The opinion of the Court of Appeals for the Second Circuit is not yet officially reported and is printed herein at pp. 5a-30a.

The opinion of the District Court for the Southern District of New York is reported at 200 F. Supp. 484 (1961) and is reprinted herein at pp. 31a-37a.

The Decision and Direction of Election of the National Labor Relations Board is reported at 134 NLRB No. 25 (1961) and is reprinted herein at pp. 38a-49a.

Jurisdiction.

The mandate of the Court of Appeals consisting of the opinion (5a-30a) and order of reversal (1a-2a) was issued on January 12, 1962 and filed in the District Court on January 30, 1962. The injunction of the District Court based on the mandate was filed on February 15, 1962 (3a-4a). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented.

1. Does the federal district court have original jurisdiction to review and enjoin an NLRB decision directing an election where no showing of violation of constitutional or express statutory rights has been made, and full judicial review of the Board's actions may be had in the circuit court after the election under the statutory review procedures of the Labor Management Relations Act (1947), Section 10(e) and (f) (29 U. S. C. §160(e) and (f)).

2. Does the NLRB have jurisdiction over the Honduran flag vessels of an American employer, United Fruit Company (UFCO), which are operated in United States commerce through a wholly owned and controlled Honduran subsidiary as part of a single integrated fleet of American and Honduran flag vessels used to carry the employer's own tropical produce to American markets?

Statutes Involved.

Petitioner contends that the maritime operations involved are within the jurisdictional coverage of the LMRA. Reprinted in the Appendix (50a) are the definitions of "commerce" and "affecting commerce" contained in the Act (29 U.S.C. §152(6) and (7)).

Statement of the Case.

Parties.

Petitioner (intervenor-defendant below) National Maritime Union of America, AFL-CIO (NMU) is an American maritime union comprised of approximately 40,000 non-officer seamen employed on vessels engaged in commerce on the deep seas and other navigable waters.

Respondent Empresa (plaintiff below) is a Honduran corporation wholly owned and controlled by UFCO which nominally holds title to UFCO's Honduran flag vessels.

The named defendant below was Ivan C. McLeod, Regional Director for the Second Region of the National Labor Relations Board. He has on his own behalf petitioned for certiorari to review the decision of the Court of Appeals for the Second Circuit.

The Operations of UFCO and Empresa in United States Commerce.

UFCO is a New Jersey corporation owned by American citizens (41a). It has world-wide diverse business interests but is primarily concerned with raising bananas, sugar, cacao and other tropical produce and their transportation to market and sale (41a). The bulk of its trade is between Central and South American locations and United States ports. It conducts its operations through a network of some fifty to sixty subsidiaries whose affairs are controlled and managed by it to advance its own commercial interests (42a). On the record before it, the NLRB found as a fact that in UFCO's relations with its subsidiaries (at 42a):

> ". . . long-range plans concerning expansion, contraction or other changes in the operation of sub-

sidiaries are generally controlled by UFCO and its decision with respect to such matters is based not so much on the needs or advancement of the subsidiaries as independent corporations, but rather upon the needs and planned development of UFCO's overall business in the production, transportation and sale of tropical produce."

Empresa is one such subsidiary. All of Empresa's directors are elected by UFCO, the sole stockholder, and they in turn elect officers (42a). While Empresa nominally holds title to the vessels involved in this case, it does not operate them for itself, but since its incorporation has time chartered all of them to UFCO, and its income derives wholly from charter fees (43a). Moreover, Empresa does not hold itself out in the world charter market as being in the business of chartering vessels. Its vessels are available to UFCO only (43a).

As the time charterer of the vessels, UFCO determines the voyages they shall make, the cargoes they shall carry, their ports of call and length of stay (44a). In exercising this control, UFCO issues instructions directly to the captains of the vessels (44a). Moreover, UFCO has wholly integrated and uses interchangeably its Honduran flag vessels sailing under the Empresa banner with American flag vessels it owns outright or bareboat charters from other subsidiaries (44a-45a). A vessel is assigned to a particular run based on its suitability from the standpoint of size or speed, and not its nominal ownership or flag (45a).

From these and other facts the Board found that Empresa's activities are "designed essentially to further the shipping operations of the parent (UFCO)"; and Empresa does not function as an independent enterprise "whose success or failure is gauged by its role in the open

market" (45a). The Board further found that Empresa and UFCO are joint employers and

> "... Empresa's maritime operations are a part of a single integrated maritime operation under the continuous, direct control and either direct or ultimate ownership of UFCO and are an essential part of a seagoing enterprise located in and directed from the United States and engaged in the commerce of this nation as described in Section 2(6) of the Act" (at 45a-46a).

The Board concluded that the substantial United States contacts of the vessels and the fact that they were clearly engaged in commerce and affect commerce brought them within the jurisdictional coverage of the Act, and ordered an election (45a-49a).

The Litigation.

Proceedings Before The NLRB

NMU initiated Board proceedings on or about November 24, 1959 by the filing of a representation petition seeking to be certified as bargaining representative for the non-officer crewmembers of the seventeen vessels UFCO operates in Empresa's name (38a-39a, 43a). A lengthy hearing followed by oral argument before the members of the Board ensued in which both UFCO and Empresa fully participated. The hearing was devoted almost exclusively to UFCO's and Empresa's defense that the Board lacked jurisdiction over the shipping operation involved (38a-39a). After the Board's decision upholding jurisdiction issued on November 15, 1961, extensive preparations were completed to hold the election which was scheduled to begin on Sunday, December 17, 1961 and continue through January 31, 1962 as each of the vessels involved touched United States ports (31a-32a).

Proceedings Before The District Court

In the late afternoon of Thursday, December 14, 1961, Empresa by order to show cause sought a temporary injunction in the United States District Court for the Southern District of New York, to enjoin the Board from proceeding with the election. The complaint (51a-59a) in substance alleged that the Board had exceeded its power in taking jurisdiction and thereby violated Empresa's rights under the United States Constitution, including the Fifth Amendment, and "principles of international law recognized and adhered to by the Department of State."

On Saturday, December 16, 1961, the District Court denied the application for a temporary injuction because it considered the likelihood of Empresa's ultimate success doubtful and found the "assertions of immediate and irreparable damage by the holding of the election, without more, are unproved and unconvincing" (37a).*

Proceedings Before The Court of Appeals

The Court of Appeals reversed the district court and directed that the injunction issue (15a-30a). Although a temporary injunction in form, in fact the Court of Appeals disposed of the entire case on the merits, and it did this on a record limited essentially to the complaint and the

*The election nevertheless did not begin the following day because at approximately the same hour that this decision was handed down, a Honduran labor union, Sociedad Nacional de Marineros de Honduras, which claims to represent the crewmembers on the vessels involved even though a majority have signed pledge cards for NMU, secured *ex parte* from the District Court of the District of Columbia a temporary restraining order enjoining the Board from proceeding with the election. The same union had previously declined at least two invitations from the Board to intervene in the proceedings and appear on the ballot in the secret election (38a, 47a). Another Honduran union, which after the close of the hearings but before the Board's decision, requested a place on the ballot was permitted to intervene (47a).

Board's decision. (The transcript of the Board hearing was not introduced by Empresa in support of its application for the injunction.) The Court of Appeals held first that the district court had original jurisdiction to review the Board's decision because of the "international aspects" (13a-17a). It then held that the vessels in question were not within the jurisdictional coverage of the Act, thereby reversing the Board.

Alleged Basis for Federal Jurisdiction In the First Instance.

Petitioner contends that the district court had no jurisdiction to review and enjoin the Board proceedings herein. The complaint alleges jurisdiction under Sections 1331 and 1337 of Title 28 of the United States Code (51a). The Court of Appeals, with some misgivings, upheld this jurisdictional claim (11a-13a).

Summary of Reasons for Granting Writ.

The Board has held the LMRA applicable to foreign flag ships in six recent cases: *West India Fruit and SS. Co.*, 130 NLRB 343, 47 LRRM 1269 (1961); *Peninsula and Occidental SS. Co.*, 132 NLRB No. 1, 48 LRRM 1293 (1961); *United Fruit Co.*, 134 NLRB No. 25, 49 LRRM 1138 (1961); *Owens-Illinois Glass Co.*, 136 NLRB No. 232, 49 LRRM 1777 (1962); *Hamilton Bros.*, 133 NLRB No. 85, 48 LRRM 1740 (1961); *Eastern Shipping Corp.*, 132 NLRB No. 72, 48 LRRM 1436 (1961). Review of *West India* and *Peninsula* is pending in the Fifth Circuit; *United Fruit* has been reversed by the Second Circuit in this case; and in *Owens-Illinois* the employer is seeking an injunction against the Board in the District Court for the District of Columbia.

In addition, the highest courts of New York and Pennsylvania have recently held that the question of Board jurisdiction is "arguable" and for the Board to decide. *Incres Steamship Company, Ltd.* v. *International Maritime Workers Union*, 10 N. Y. 2d 218 (1961); *Navios Corp.* v. *National Maritime Union*, 402 Pa. 325 (1960). The same result was reached by the District Court for the Southern District of New York in *Afran Transport Co.* v. *National Maritime Union*, 169 F. Supp. 416 (S. D. N. Y. 1958).

Conflicting claims as to the jurisdiction of the Board, federal courts, and state courts are thus involved in these controversies. This Court deemed the issues of sufficient importance to grant certiorari in *Incres Steamship Company, Ltd.* v. *International Maritime Workers Union*, *supra*, where the employer contends that the state court alone has jurisdiction over foreign flag ships and the Board has none. Review of the present case along with *Incres* would aid in clarifying this difficult and important problem and bring to an end pending litigation, since here the Second Circuit has held that the question of whether the Board has jurisdiction over particular foreign flag ships is to be decided by the federal district courts.

Certiorari should also be granted because the decision of the Court of Appeals represents a fundamental change in the long established rules (1) that Board determinations in election cases are, with narrow exceptions not present here, non-reviewable in the district courts (*Leedom* v. *Kyne*, 358 U. S. 185 (1958); and (2) that the Board has exclusive primary authority to determine its own jurisdiction in cases pending before it, and there may be no review of Board action until administrative remedies have been exhausted, and then only in the appropriate circuit

court as provided in Section 10(e) and (f) of the Labor Act (29 U.S.C. §160(e) and (f)) (*Myers* v. *Bethlehem Shipbuilding Corp.*, 503 U. S. 41 (1938)).

POINT I.

Certiorari should be granted to review the decision of the Court of Appeals which substitutes the District Court for the Board as the authority to determine LMRA application to foreign flag ships and gravely imperils any hope for a uniform solution for this important problem of federal labor law.

The rule is long settled that Board decisions in election cases are not reviewable by the district courts. *American Federation of Labor* v. *National Labor Relations Board*, 308 U. S. 401 (1940). Under Section 9(d) (29 U.S.C. §159(d)), of the Act, such decisions are reviewable only when they form the basis for a Board unfair labor practice order, and that order is before the Court of Appeals for review under Section 10(e) or (f) of the Act (29 U.S.C. §160(e) and (f)).

The aim of the statute is to eliminate drawn-out litigation which would frustrate the Act's basic purpose of minimizing industrial strife. Relevant legislative history is set forth in full in *Leedom* v. *Kyne*, 358 U. S. 185, 191-194 (1958); *American Federation of Labor* v. *NLRB*, 308 U. S. 401, 405-411 (1940); *Fitzgerald* v. *Douds*, 167 F. 2d 714, 716-717 (2d Cir. 1948); *Madden* v. *Brotherhood of Union of Transit Employees*, 147 F. 2d 439, 443-444 (4th Cir. 1945).

The statutory scheme expressly affords employers a full opportunity for review of unfavorable representation

decisions by refusing to bargain with the certified union. The resulting unfair practice case incorporates the record of the representation case for review by the Court of Appeals. This has uniformly been held to be the exclusive method for review by employers and was available to Empresa in this case. *Atlas Life Insurance Co.* v. *Leedom*, 284 F. 2d 231 (C. A. D. C. 1960); *General Cable Corp.* v. *Leedom*, 278 F. 2d 237, 239 (D. C. Cir. 1960); *Norris* v. *NLRB*, 177 F. 2d 26 (D. C. Cir. 1949); *Boyles Galvanizing Co.* v. *Waers*, 291 F. 2d 791 (10th Cir. 1961).

Because the review procedures available to employers under Section 9(d) are not available to unions, two narrow exceptions to non-reviewability have been recognized for district court actions brought by unions. In such cases review is allowable when Board action raises substantial constitutional questions. *Fay* v. *Douds*, 172 F. 2d 720 (2d Cir. 1949); or violates an expressed statutory command. *Leedom* v. *Kyne*, *supra*.

Aside from the fact that Empresa is an employer, its complaint does not come within either of these limited exceptions. As the Court of Appeals found, no clear statutory mandate exempts Empresa from the LMRA (14a); nor is Empresa entitled to such exemption as a matter of constitutional right (14a-15a). To justify judicial intervention here, the court was compelled to carve out an entirely new exception to the rule of non-reviewability, namely, that district courts may intercede where Board action ramifies into the "field of foreign relations" or has "international aspects" (15a-17a).

This exception for "international aspects" is very different from the *Fay* v. *Douds*, *supra*, or *Leedom* v. *Kyne*, *supra*, exceptions where the courts intercede to protect existing constitutional or statutory rights which are plainly

in jeopardy. Here the test for intercession is not the rights which require protection but the subject matter of the controversy before the Board. When "international aspects" are present, the Court of Appeals has held, the Board's primary authority to adjudicate the jurisdictional reach of the Act must yield to the district courts.

This is a drastic and we believe dangerous innovation in the traditional relationship between the Board, an independent administrative agency, and the courts which has been marked by a policy of non-interference. From the earliest days of the Wagner Act, this Court has required that when proceedings are pending before the Board the administrative processes of the agency must be exhausted before there may be judicial review of the controversy, including questions of jurisdiction, and then such review is allowable only through the appropriate circuit court as provided in section 10(e) or (f) of the Act (29 U.S.C. §160 (e) or (f)). *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41 (1938).

Under the "international aspects" test, parties dissatisfied with the way matters are progressing for them before the Board are invited to invoke the intervention of the district courts at almost any intermediate stage of the proceedings, as Empresa did here.

Every district judge in the nation is thereby made a potential arbiter of Board jurisdiction in the foreign flag field. This result will reduce to shambles the basic scheme of the LMRA wherein Congress to achieve a uniform national labor policy created the NLRB as a single paramount administrative or quasi-judicial authority to guide and regulate the development of federal labor law.

In *Amazon Cotton Mill* v. *Textile Workers Union*, 167 F. 2d 183 (4 Cir. 1948) the Fourth Circuit remarked on the havoc that would be wrought with the LMRA if the Act

were deemed to have the "effect of clothing each of the more than two hundred district judges of the country with the powers over unfair labor practices vested in the National Labor Relations Board. . . ." This Court has many times sounded the same warning. In *Garner* v. *Teamsters, Chauffeurs & Helpers, etc.*, 346 U. S. 485 (1953) it observed that (at pp. 490-91):

> "Congress did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties. It went on to confide primary interpretation and application of its rules to a specific and specially constituted tribunal and prescribed a particular procedure for investigation, complaint and notice, and hearing and decision, including judicial relief pending a final administrative order. Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules and to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies . . . . A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law. The same reasoning which prohibits federal courts from intervening in such cases, except by way of review or on application of the federal Board, precludes state courts from doing so."

The conflicts envisioned have already appeared in this case. The Court of Appeals in its opinion carefully refrained from deciding this case "on an all or nothing basis" (16a). It rejected as a fiction the notion that a foreign ship is a floating piece of the country whose flag it flies; and emphasized that in another case where the contacts of the vessel with the flag state were different, it might very well uphold Board jurisdiction (20a-21a, 30a).

In a case involving the very same facts but a different plaintiff, the District Court for the District of Columbia reached the "all or nothing" result with a sweeping decision that the Board simply did not have jurisdiction over foreign flag ships. *Sociedad Nacional de Marineros de Honduras* v. *McCulloch*, Civ. No. 4020-61, 49 LRRM 2434 (D. C. 1962).

We believe the Court of Appeals erroneously held that Empresa's operations do not come within the jurisdictional coverage of the LMRA. We appreciate, however, that this is not the first concern of this Court on a petition for certiorari. What should be of immediate concern, however, is that the Court of Appeals in reaching its decision largely ignored Empresa's United States contacts stressed by the Board in upholding jurisdiction, and instead emphasized other contacts which it found more persuasive. The court, for example, tended to overlook the Board's finding that Empresa was a controlled corporate device by means of which UFCO met its needs for waterborne transportation in United States commerce, and that Empresa's vessels were fully integrated with UFCO's American flag ships as part of a single unified maritime operation. These and other findings clearly establish that the Board's conclusion that it had jurisdiction over the vessels was amply supported by substantial evidence in the record as a whole and well within the bounds of agency discretion.

The Board has recently decided six cases in the foreign flag shipping field, i.e.: *West India Fruit and SS. Co.*, 130 NLRB 343, 47 LRRM 1269 (1961); *Peninsular and Occidental Steamship Co.*, 132 NLRB No. 4, 48 LRRM 1293 (1961); *Eastern Shipping Corp.*, 132 NLRB No. 72, 48 LRRM 1436 (1961); *United Fruit Co.*, 134 NLRB No. 25, 49 LRRM 1138 (1961); *Hamilton Bros.*, 133 NLRB No. 85, 48 LRRM 1740 (1961); *Owens-Illinois Glass Co.*, 136 NLRB No. 32, 49 LRRM 1777 (1962). Each of these cases has

required of the Board what this Court described in *San Diego Building Trades* v. *Garmon*, 359 U. S. 236, 242 (1959) as "*ad hoc* inquiry into the special problems of labor-management relations involved in a particular set of occurrences" to determine the impact "on the entire scheme of federal labor policy and administration." No uniform fact situation is discernible to which a generalized formula applies.

Foreign flag ships may be owned and controlled outright by American corporations (*West India, Hamilton Bros.* and *Owens-Illinois*); or they may be owned and controlled by American interests operating through nominal foreign corporations (*Peninsular and Occidental, United Fruit; Cf. Navios Corp.* v. *National Maritime Union*, 402 Pa. 325 (1960)); or they may be owned by foreign interests and operated jointly through a foreign corporation and a domestic agency corporation (*Eastern; Cf. Incres SS. Co. Ltd.* v. *International Maritime Workers Union*, 10 N. Y. 2d 218 (1961)). The services engaged in by the vessels in each case similarly vary. They may operate as car ferries shuttling back and forth on short voyages between a United States port and a nearby foreign port (*West India*); they may carry passengers in the Caribbean cruise trade as does Incres (*Peninsular and Occidential* and *Eastern*); they may engage in the banana boat trade (*United Fruit Co.* and *Hamilton Bros.*); or they may tow barges loaded with pulpwood (*Owens-Illinois*). The proceeding may come before the Board on the petition or charge of a foreign union (*Hamilton Bros.*), or an American union (*West India, Peninsular* and *Occidental, Eastern, United Fruit, Owens-Illinois*).

In each one of these cases the Board was called upon to assemble and evaluate a unique array of facts and reach a determination as to whether it was dealing with an essentially domestic enterprise or something else—or whether

the foreign aspects of a particular case militated against the assertion of jurisdiction.

The Board's leading case, *West India*, is an outstanding opinion and speaks for itself as to the quality of the Board's dedication and sensitivity to the problem.

Faithfully following the guide lines set down by this Court in *Lauritzen* v. *Larsen*, 345 U. S. 571 (1953) and reaffirmed in *Romero* v. *International Terminal Operating Co.*, 358 U. S. 354 (1959), the Board conceived of its task in *West India* as " 'ascertaining and valuing points of contact between the transactions and the governments whose competing laws are involved.' " (130 NLRB at 354). With respect to the Labor Act, the Board properly concluded that " 'foreign commerce of the United States' is both an important and necessary contact within the intent of *Lauritzen.*"

In employing the contacts test, the Board did not ignore flag doctrine or other principles of maritime or international law. It simply assigned to these factors their proper weight in the general reckoning.

Board determinations as to the jurisdictional reach of the Act have repeatedly been held entitled to great respect—certainly more respect than was afforded by the Court of Appeals in this case. *National Labor Relations Board* v. *E. C. Atkins & Co.*, 331 U. S. 398 (1947). To its task the Board brings its vast experience and special competence in administration of the Act. No agency of government is better suited than the Board to gauge the impact on commerce of a particular shipping operation and evaluate other relevant statutory and economic considerations militating for or against application of the Act.

Moreover, as a single agency with exclusive jurisdiction to administer the LMRA, the Board is able to treat each ruling it is called upon to make in the foreign flag shipping field as part of a growing body of its own decisional law

applicable to the problem. This assures a uniform and systematic development of the law.

The district courts can be no substitute for the Board in this delicate and specialized adjudicatory process. Moreover, if federal district courts are held to have authority to determine Board jurisdiction over foreign flag ships, then state courts must have the same authority. This is precisely the position taken by the dissenting judges in *Incres SS. Co.* v. *International Maritime Workers Union*, 10 N. Y. 2d at 227-231 (1961).

Plainly, to permit all state and federal courts of original jurisdiction to determine under their general equity powers whether the Board does or does not have jurisdiction in a particular foreign flag case is bound to lead to a multiplicity of conflicting and disparate decisions. The result will be to place a premium on forum shopping in an area of federal labor policy where uniformity is particularly to be desired (*Local 174, Teamsters* v. *Lucas Flour Co.*, 30 L. W. 4167, 4170, 49 LRRM 2717, March 5, 1962).

POINT II.

For all of the foregoing reasons the petition for a writ of certiorari should be granted.

Respectfully submitted,

HERMAN E. COOPER,
H. HOWARD OSTRIN,
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EUGENE N. SOSNOFF,
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APPENDIX A.

Order of Reversal of United States Court of Appeals for the Second Circuit.

United States Court of Appeals

FOR THE

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York on the twelfth day of January one thousand nine hundred and sixty two.

Hon. J. EDWARD LUMBARD
Chief Judge

Hon. HENRY J. FRIENDLY
Hon. THURGOOD MARSHALL
Circuit Judges

EMPRESA HONDURENA DE VAPORES, S. A.,
Plaintiff-Appellant,

v.

IVAN C. McLEOD, Regional Director for the Second Region of the NATIONAL LABOR RELATIONS BOARD,
Defendant-Appellee,

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO,
Intervenor-Appellee.

61 Civ. 4413

U. S. District Court
Filed
Jan. 30, 1963
S. D. of N. Y.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

Order of Reversal of United States Court of Appeals for the Second Circuit.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is reversed.

A. DANIEL FUSARO
Clerk

A true copy

(SEAL)

s/ A. DANIEL FUSARO
Clerk

UNITED STATES
SECOND CIRCUIT
COURT OF APPEALS

(Reverse side)

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

Filed January 12, 1962

A. DANIEL FUSARO, Clerk

APPENDIX B.

Injunction of District Court Entered on Mandate of Court of Appeals.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK.

EMPRESA HONDURENA DE VAPORES, S. A.,

Plaintiff,

against

IVAN C. McLEOD, Regional Director for the Second Region of the National Labor Relations Board,

Defendant.

U. S. District Court
Filed
Feb. 16, 1962
S. D. of N. Y.
61 Civil 4413
Order.

A motion having been made by plaintiff for an order providing that the mandate of the United States Court of Appeals for the Second Circuit, consisting of the opinion of the Honorable Henry J. Friendly, Circuit Judge, concurred in by the Honorable J. Edward Lumbard, Chief Judge, and Thurgood Marshall, Circuit Judge, and the order of reversal of the United States Court of Appeals for the Second Circuit dated January 12, 1962, filed with the Clerk of this court on January 30, 1962, be made the order of this court and providing for the injunctive relief requested by plaintiff in the order to show cause dated December 12, 1961, and providing for the denial of the motion made by defendant for a dismissal of the action, and on motion of White & Case, attorneys for plaintiff, it is

1. ORDERED, that the mandate of the United States Court of Appeals for the Second Circuit, filed with the Clerk of the United States District Court for the Southern District

of New York on January 30, 1962, is hereby made the order of this court;

2. ORDERED, that pending the trial and adjudication of the issues raised by the complaint herein, the defendant, Ivan C. McLeod, Regional Director for the Second Region of the National Labor Relations Board, and all persons acting for or in concert or in participation with him who receive actual notice of this order by personal service or otherwise, are hereby enjoined from conducting a representation election among plaintiff's unlicensed seamen until the final hearing and determination of this action, and it is further

3. ORDERED, that security in the amount of $500 be furnished by plaintiff conditioned for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined, and it is further

4. ORDERED, that the motion of defendant to dismiss the complaint be, and the same hereby is, denied.

Dated: New York, New York
February 15th, 1962

EDMUND L. PALMIERI
United States District Judge

APPENDIX C.

Opinion of the Court of Appeals for the Second Circuit.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT.

No. 233—September Term, 1961.

(Argued December 20, 1961 Decided January 12, 1962.)

Docket No. 27314

EMPRESA HONDURENA DE VAPORES, S.A.,
Plaintiff-Appellant,

—v.—

IVAN C. McLEOD, Regional Director for the Second Region of the National Labor Relations Board,
Defendant-Appellee,

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO,
Intervenor-Appellee.

Before:

LUMBARD, *Chief Judge*,

FRIENDLY and MARSHALL, *Circuit Judges*.

Plaintiff appeals from an order of the District Court for the Southern District of New York, Edmund L. Palmieri, *Judge*, denying a motion to enjoin defendant, Regional Director of the National Labor Relations Board, *pendente lite* from conducting a representation election on plaintiff's Honduran registered vessels. Reversed.

ORISON S. MARDEN (White & Case), New York, New York (Chester Bordeau and William D. Conwell, of Counsel), *for Plaintiff-Appellant.*

ALLAN I. MENDELSOHN (Stuart Rothman, General Counsel, Dominick L. Manoli, Associate General Counsel, Marcel Mallet-Prevost, Assistant General Counsel, National Labor Relations Board, Washington, D. C., and Samuel M. Kaynard, Regional Attorney, New York, New York), *for Defendant-Appellee.*

HERMAN E. COOPER, New York, New York, *for Intervenor-Appellee.*

ALFRED A. GIARDINO, New York, New York, *for United Fruit Company.*

FRIENDLY, *Circuit Judge:*

The complaint of Empresa Hondurena de Vapores, S.A., hereafter Empresa, against the Regional Director of the National Labor Relations Board, filed in the District Court for the Southern District of New York on December 12, 1961, made allegations which we summarize as follows:

(1) Empresa is a Honduran corporation, organized in 1941, with its principal office and place of business in Puerto Cortes, Honduras. It operates thirteen seagoing vessels, ten of which it owns and three of which are owned by Balboa Shipping Company, Inc., a Panamanian corporation, which, like plaintiff, is a wholly owned subsidiary of United Fruit Company, a New Jersey corporation. All the vessels are registered under the laws of Honduras and fly the Honduran flag.

(2) The vessels are manned by unlicensed seamen, some 335 in number, all but one of whom are citizens of Honduras (the one being a British subject), employed in Honduras

under Shipping Articles executed there. The vessels, all of which are time-chartered to United Fruit, ply between ports in Central and South America, the United States, Canada and Europe; all of them call regularly at Honduran ports for trade and renewal of Ship's Articles. Since 1941 the seamen have been represented by Sociedad Nacional de Marineros de Honduras, a Honduran labor union recognized by the Republic of Honduras, hereafter Marineros, as their collective bargaining agent. A collective bargaining agreement between Empresa and Marineros was made in 1957, to remain effective until April 15, 1959, and thereafter to be automatically renewed for successive two year terms in the absence of contrary notice; it now stands renewed until February 15, 1963. Honduras "has a long established and comprehensive system of laws and regulations governing all aspects of the ownership and operation of vessels registered in Honduras and the employment of personnel thereon"; under that law plaintiff is required to recognize Marineros as the exclusive bargaining agent of its unlicensed seamen, and labor grievances are handled by representatives of plaintiff and Marineros subject to the Ministry of Labor and the Labor Courts of Honduras.

(3) On November 15, 1961, the NLRB rendered a Decision and Direction of Election, 134 NLRB No. 25, which, as later modified, instructed the defendant Regional Director to conduct an election among plaintiff's seamen to determine whether they desired to be represented for collective bargaining purposes by National Maritime Union, AFL-CIO, by Sindicato Maritimo Nacional de Honduras ("Sindimar"), or by neither.[1] The Honduran Labor Code prohibits the exercise of functions by a union "so long as it does not have recognition of its juridic personality" or if its personnel is not at least 90% Honduran; National Maritime Union fails on both counts. Defendant has in-

[1] The Board's decision states that Marineros was notified the Board would grant it a right to intervene but did not reply.

formed plaintiff that the election is to take place, beginning December 17, 1961, on board vessels arriving in United States ports between December 17, 1961 and January 31, 1962, and by mailing ballots to employees on vessels not so scheduled.

Alleging that the Board's direction violated Article 10 of the Treaty of Friendship, Commerce and Consular Rights between the United States and Honduras dated December 7, 1927, 45 Stat. 2618,[2] as well as the Constitution of the United States and principles of international law, plaintiff sought temporary and permanent injunctive relief. By order to show cause signed December 12, 1961, on an affidavit of counsel incorporating the allegations of the complaint, the motion for a temporary injunction was brought on for hearing before Judge Palmieri on December 14. The Regional Director moved to dismiss. He asserted that the District Court lacked jurisdiction over a direction for an election, that the request for relief was premature, that the members of the NLRB were indispensable parties defendant, and that in any event the Board's action was proper.

Relevant to the last contention are certain additional facts stated in the Board's opinion and not challenged before us: United Fruit Company is predominantly United States owned. The bulk of its trade is between Central and South American countries which grow bananas and other tropical produce, and the United States. Empresa's officers are elected by its directors who are elected by United Fruit, and Empresa has always time-chartered all its vessels, almost entirely to United Fruit. However, Empresa "appears to function as a distinct corporate entity," and

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[2] This states:

> "Merchant vessels and other privately owned vessels under the flag of either of the High Contracting Parties and carrying the papers required by its national laws in proof of nationality shall, both within the territorial waters of the other High Contracting Party and on the high seas, be deemed to be the vessel of the Party whose flag is flown."

"There is nothing in the record to suggest that Empresa does not in fact carry out * * * typical responsibilities of the owner of a vessel under a time charter," including "hiring the officers and crews and handling all matters concerning terms and conditions of employment including payment of wages and discipline of the personnel."[3] On the other hand, United Fruit determines the routing of Empresa's ships, communicating its desires and complaints to the captain or to some other officer of Empresa. The vessels regularly call at United States ports, carrying United Fruit cargo on inbound and outbound voyages and also general cargo on the latter; some of the ships also carry passengers. Empresa's vessels are used by United Fruit in the same manner as other chartered or owned vessels registered under United States law.

It should be observed also that the Attorney General, acting at the request of the Departments of State and Defense was permitted to appear as *amicus curiae* before the Board in this and related cases. Although the Attorney General's brief to the Board stated that it was not its "purpose * * * to support or oppose the position of the steamship companies or the position of the unions" (p. 2), it advanced (pp. 15-20) a list of proposed "principles to be applied in determining whether a vessel and its crew shall be deemed foreign and thus beyond the scope of the Act," and "submitted * * * that the flag, as a ready, recognizable, and accepted standard must be preferred pragmatically to any other and that in accordance with that standard, the indirect financial interest of American citizens in a foreign registered ship may not deprive a vessel of its status as a national of the country whose flag is flown."

Despite the time pressure created by plaintiff's failure to bring this action until almost the eve of the scheduled election, Judge Palmieri prepared a thoughtful opinion,

[3] In view of these and other specific findings of fact we consider the Board's statement that United Fruit is a "joint employer" to be an erroneous legal conclusion, which must be disregarded.

filed on December 16. Holding that the District Court had jurisdiction of the subject matter since, as he believed, plaintiff had made a colorable allegation of denial of constitutional rights see *Fay* v. *Douds*, 172 F. 2d 720, 723 (2 Cir. 1949), he nevertheless denied the injunction since he was not convinced of the probability of plaintiff's success or by its claims of irreparable damage from the election. He therefore deemed it unnecessary to decide at that time whether the members of the Board were indispensable parties.

Although a motion for a stay pending appeal was initially denied, the appeal itself was argued on December 20. Meanwhile the election had been stayed as the result of a temporary restraining order issued by the District Court for the District of Columbia in an action by Marineros against the members of the Board. The argument having convinced us that the case presented serious issues involving the relations of the United States with a foreign government and that no irreparable damage would be caused by a brief delay of the election, we then issued a stay pending determination of the appeal. We have reached a conclusion different from that of the District Judge.

Two other circumstances must be mentioned before we proceed further: Under date of December 15, 1961, the Department of State, through its Legal Adviser, forwarded to Judge Palmieri, without comment, a note dated November 29, 1961, from the Ambassador of Honduras, protesting against the Board's decision, which was claimed to violate Articles 10 and 22 of the Treaty of Friendship, Commerce and Consular Rights,[4] to involve an intrusion by the United

[4] Article 22 provides that "A consular officer shall have exclusive jurisdiction over controversies arising out of the internal order of private vessels of his country, and shall alone exercise jurisdiction in cases, wherever arising, between officers and crews, pertaining to the enforcement of discipline on board, provided the vessel and the persons charged with wrongdoing shall have entered a port within his consular districts. Such an officer shall also have jurisdiction over issues concerning the adjustment of wages and the execution of contracts relating thereto provided the local laws so permit."

States into an area exclusively occupied by Honduras, and to infringe established principles of international law; the communication did not reach Judge Palmieri until December 18, after his decision had been filed. On January 10, 1962, the Department of Justice submitted to the District Court for the District of Columbia a letter saying that although the Department of State "does not support all the statements in the Honduran Note, it agrees with the conclusion that jurisdiction of the National Labor Relations Board should not attach in this case."

1. The Jurisdiction of the District Court.

(1) Although the issue has not been raised, we must first consider whether the complaint, invoking 28 U. S. C. §§1331 and 1337, set forth a claim cognizable by a Federal district court, *Mitchell* v. *Maurer*, 293 U. S. 237, 244 (1934). As subsequent discussion will show, the complaint advanced a claim arising under a treaty sufficient to come within §1331, whether or not the claim was meritorious; the difficulty with respect to §1331 is jurisdictional amount. When a plaintiff asserts the right to be free from regulation, "The value of that right may be measured by the loss, if any, which would follow the enforcement of the rules prescribed." *McNutt* v. *General Motors Acceptance Corp.*, 298 U. S. 178, 181 (1936). Here the complaint alleged that "the matter in controversy exceeds the value of $10,000, exclusive of interest and costs," but no facts were pleaded to substantiate this, and it is not obvious that an election alone would cause damage in that amount. Hence, if the allegation had been put in issue, as it was in the *McNutt* case and in *K V O S, Inc.* v. *Associated Press*, 299 U. S. 269 (1936), and plaintiff had not supported it, Federal jurisdiction under §1331 could not be sustained. However, no such traverse was made and the allegation was not so clearly baseless that the court was bound to disregard it even in the absence of challenge, although the

court "might, of its own motion, have entered upon an inquiry to ascertain whether the cause was one over which it had jurisdiction," *K V O S, Inc.* v. *Associated Press, supra*, at 277.

Moreover, we think the complaint asserted a claim under §1337, giving district courts jurisdiction "of any civil action or proceeding arising under any Act of Congress regulating commerce • • •," without regard to the amount in controversy. The National Labor Relations Act is such an Act, *American Federation of Labor* v. *Watson*, 327 U. S. 582 (1946); *Capital Service, Inc.* v. *NLRB*, 347 U. S. 501 (1954); the question is whether the action here is one "arising under" it. In support of a negative answer it could be said that what plaintiff is asserting is a right to be free from the Act, not a right allegedly conferred by it. But §1337, like §1331, speaks not of a claim created by, but of an action arising under, an act regulating commerce; it would run counter both to the language and to the policy underlying the statute to hold that the jurisdictional grant did not include an action whose sole purpose is to challenge an order of a Federal agency sought to be justified by a Federal statute. Whatever might earlier have been thought because of language in *American Well Works Co.* v. *Lane & Bowler Co.*, 241 U. S. 257, 260 (1916), the later decision in *Smith* v. *Kansas City Title & Trust Co.*, 253 U. S. 180 (1921), seems to have crossed that bridge, see *Association of Westinghouse Salaried Employees* v. *Westinghouse Electric Corp.*, 348 U. S. 437, 450 (1955); cases such as *Louisville & Nashville R.R.* v. *Mottley*, 211 U. S. 149 (1908), are distinguishable in that the action was to enforce a claim arising under state law, there a right under a contract, with the Federal statute a matter of defense, see also *Skelly Oil Co.* v. *Phillips Petroleum Co.*, 339 U. S. 667, 672 (1950), whereas here, as in *Smith*, it is the proposed application of the Federal statute alone that gives rise to the action. We do not pretend the distinction to be altogether clear or satisfying; but if one line of cases or the other

has to be favored, considerations of good sense support those permitting the sphere of application of Federal statutes to be determined by Federal courts.[5]

(2) The next problem as to the jurisdiction of the District Court is presented by the first two grounds of defendant's motion to dismiss, best considered together, namely, that the court has no power to enjoin an order for an election, especially at the suit of the employer, and that plaintiff's resort to the courts is premature.

In *Local 1545, United Brotherhood of Carpenters* v. *Vincent*, 286 F. 2d 127 (2 Cir. 1960), we stated that Dis-

[5] Professor Mishkin believes it now to be settled "that an action for a judgment declaring the non-existence of such a federally created right in the other party also falls within the federal question statute." The Federal "Question" in the District Courts, 53 Colum. L. Rev. 157, 179 (1953).

We have not overlooked that the action here is against a Federal officer—a circumstance which one feels ought make a difference but apparently, under existing statutes, doesn't. Simply as a matter of language it might be argued that if jurisdiction under 28 U. S. C. §1331 fails for lack of the required amount, the action would come within 28 U. S. C. §1346(a)(2) giving the district courts jurisdiction over "Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department • • •" But, apart from the inconsistency that one contention would assert the suit to be against the United States whereas the other would deny it, and the question whether §1346(a)(2), the successor of the Tucker Act, 24 Stat. 505 (1887), authorizes an injunction, see *United States* v. *Jones*, 131 U. S. 1 (1889); cf. *Hatahley* v. *United States*, 351 U. S. 173, 182 (1956), the argument would fail on the basis that "where the officer's powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign actions." *Larson* v. *Domestic and Foreign Commerce Corp.*, 337 U. S. 682, 689 (1949). An authority on the subject says, with respect to such suits against federal officers, that "Apart from situations where a method of judicial review is particularly prescribed by statute, the only grant of jurisdiction that includes such cases is that in matters 'arising under' the Constitution or the laws. This mode of treatment includes limitations, such as jurisdictional amount and the rule that federal questions must appear without anticipation of defenses, that have no place in actions against federal officials, which are necessarily of federal concern." Wechsler, Federal Jurisdiction and the Revision of the Judicial Code, 13 Law & Contemporary Problems 216, 220 (1918). *Deering Milliken, Inc.* v. *Johnston*, —— F. 2d ——, —— (4 Cir. 1961), might suggest that §10(c) of the Administrative Procedure Act, 5 U. S. C. §1009(c), could serve here as a special statutory provision such as Professor Wechsler mentions, but that would require us to decide whether the NLRB's direction of election constituted "final agency action" within the meaning of that Act.

trict Court jurisdiction to enjoin Board directions in representation matters had been recognized in two types of cases, namely, (i) where plaintiff made an assertion, "not transparently frivolous," that failure to enjoin would deny rights guaranteed by the Constitution, *Fay* v. *Douds*, 172 F. 2d 720, 723 (2 Cir. 1949), and (ii) where the Board had acted in plain contravention of a specific mandate of the Act, *Leedom* v. *Kyne*, 249 F. 2d 490 (D. C. Cir. 1957), aff'd 358 U. S. 184 (1958). The instant case does not come within the second exception; although we conclude that the Board erred, its error was far from "plain," *International Assn. of Tool Craftsmen* v. *Leedom*, 276 F. 2d 514, 516 (D. C. Cir. 1960). Neither, with all respect to the learned District Judge, do we think it came within the first. Assuming as we do that the claim that the Board's action violated Article 10 of the 1927 Treaty with Honduras, see fn. 2, was "not transparently frivolous," a claim that such action violated any constitutional rights of plaintiff would be. For, apart from the uncertainty how far a treaty confers rights upon nationals of the foreign state as distinguished from the state itself, see American Law Institute, Restatement of the Foreign Relations Law of the United States, Tent. Draft No. 5, §§109 and 110; cf. *Asakura* v. *Seattle*, 265 U. S. 332 (1924) and 28 U. S. C. §1350, the Constitution does not prohibit Congress from legislating in violation of a treaty, *The Cherokee Tobacco*, 11 Wall. 616 (1870); *Head Money Cases*, 112 U. S. 580, 597-600 (1884), or directing its delegate to that end. On the other hand, the courts will not assume such a purpose on the part of Congress unless "clearly expressed," *Cook* v. *United States*, 288 U. S. 102, 119-120 (1933); *Whitney* v. *Robertson*, 124 U. S. 190, 194 (1888)—for one reason because such a violation would involve the United States in a claim for breach of its international obligation, Restatement of the Foreign Relations Law of the United States, Tent. Draft No. 3, §128. Any benefit plaintiff takes from the

Treaty thus goes to statutory interpretation, not to constitutional right.

However, the failure of the complaint to come within either of the categories of actions to enjoin representation orders that have heretofore been sustained is not fatal; the book has not been closed for all time. *Leedom* v. *Kyne*, *supra*, must be taken to have determined that, whatever may be the case with respect to orders of the National Mediation Board as to bargaining units, see *Switchmen's Union* v. *National Mediation Board*, 320 U. S. 297 (1943); *U. N. A. Chapter, Flight Engineers International Assn.* v. *National Mediation Board*, 294 F. 2d 905 (D. C. Cir. 1961), cert. denied, ——U. S.—— (1962), representation orders of the NLRB have not been vested with complete immunity from injunction, either by inferences from the National Labor Relations Act or on the principle of *Myers* v. *Bethlehem Shipbuilding Corporation*, 303 U. S. 41 (1938). Once that step has been taken, the courts must make up their minds, as best they can, whether in a particular type of case Congress would or would not have wished them to intervene against "agency action taken in excess of delegated powers," 358 U. S. at 190. The considerations as to delay from judicial intervention, persuasively marshalled in Mr. Justice Brennan's dissent for Mr. Justice Frankfurter and himself in *Leedom* v. *Kyne*, *supra*, at 191-196, argue for a negative answer in the usual case, having purely domestic significance, where the Board is alleged to have acted wrongly, although not plainly so; hence we gave such an answer in the *Local 1545* case and in *McLeod* v. *Local 476*, 288 F. 2d 198 (2 Cir. 1961), as the Court of Appeals for the District of Columbia has done in numerous cases cited in the *Local 1545* opinion.[6] An altogether different

[6] We take it that the point of the "plain contravention" requirement is to close the doors of the courts at the very outset to actions for injunctions in representation matters, which, though ultimately found unmeritorious, would have accomplished much of their objective by the very time required for judicial consideration. An inevitable corollary of the requirement is that a court must sometimes refuse to entertain a complaint asserting what it regards as a valid claim.

situation is presented when, as here, there is a substantial claim that the Board is exceeding its jurisdiction in the field of foreign relations and is thereby offending a friendly foreign government; we cannot believe Congress would have wished to limit the role of the courts in that situation to cases where the Board had violated a "clear statutory command," *Leedom v. Norwich, Connecticut Printing Specialties and Paper Products Union*, 275 F. 2d 628 (D. C. Cir.), cert. denied, 362 U. S. 969 (1960), as against a command not so clear. Not only is the case in favor of judicial action stronger than in the typical domestic representation dispute, but the practical objections against it are weaker. Here the Board is entering a new and sensitive area of activity; while we do not assert that its jurisdiction with respect to foreign-flag ships is to be decided on an all or nothing basis, the significant variations among the fact patterns are sufficiently few that guidelines ought soon be pricked out by the courts[7]—failing the more desirable solution of new legislation—and the problem will thus not be a constantly recurring one.

Assuming that the principle of *Leedom* v. *Kyne* may be thus extended in a proper case, two further problems must be faced. One is that here the suit is by the employer who, arguably, is sufficiently protected by the possibility of sitting out the election and certification, continuing to recognize the existing union, awaiting the filing of an unfair labor practice charge for so doing, and, when held for this, bringing the direction of election before a court of appeals, as provided in §9(d) of the Act, on enforcement or review proceedings under §10(f). The second is that, unlike *Leedom* v. *Kyne*, the instant action was brought to enjoin an election rather than a certification. See Cox, The Major Labor Decisions of the Supreme Court, October Term 1958,

[7] The Supreme Court has already granted certiorari, —— U. S. —— (1961), in a case involving one rather typical pattern, *Incres Steamship Co., Ltd.* v. *International Maritime Workers Union*, 10 N. Y. 2d 218, 219 N. Y. S. 2d 21 (1961).

reprinted in Gellhorn and Byse, Administrative Law: Cases and Comments (1960 ed.), 441, 447-448.

An answer to the first point may be that, as shown in 73 Harv. L. Rev. 84, 219-220 (1959), the possibility of the plaintiff's precipitating an unfair practice charge was present in *Leedom* v. *Kyne* itself; yet the Court evidently did not deem this fatal. An answer to the second, in the circumstances here, is that, with Marineros not on the ballot, the situation was not one, such as in *Local 1545*, where a victory by a particular union at the polls might eliminate any need for resorting to the courts; here, whether the winner was N M U, Sindimar, or "no-union," plaintiff would suffer by being obliged to breach its contract with Marineros and, on the allegations of its complaint, to violate Honduran law by doing so. Sufficient though these answers may be, a more generally satisfying one is again the distinction between a case with international aspects and one without. If action ordered by the Board would trench on the jurisdiction of a foreign government contrary to the will of Congress, the best time to stop it is before the offense occurs, not somewhere along the line.

(3) The final problem as to the power of the District Court to entertain the action arises from the contention of the Regional Director[8] that the action must be dismissed since the members of the Labor Board were indispensable parties-defendant but were not named as such and could not have been served with process in the Southern District of New York and would have had a valid venue objection, 28 U. S. C. § 1391(b), if they had been.

So far as we have been able to determine, this precise question has not been squarely decided by any court of appeals. It has provoked differences of opinion in the district courts. In *American Communications Ass'n* v. *Schauf-*

[8] The Board's order of November 15 provided: "The Regional Director . . . shall direct and supervise the election"; the supplemental order of December 5 provided "for the conduct of the election as the discretion of the Regional Director."

fler, 80 F. Supp. 400 (E. D. Pa. 1948), a three-judge court with one judge dissenting, and in *White* v. *Douds*, 80 F. Supp. 402 (S. D. N. Y. 1948), Chief Judge Ryan, held that the Board members were essential parties-defendant. In *Local 1545, United Brotherhood of Carpenters* v. *Vincent*, 187 F. Supp. 921 (S. D. N. Y. 1960), Judge Dimock took a contrary view, citing *Williams* v. *Fanning*, 332 U. S. 490 (1947); in affirming his dismissal of the complaint on other grounds, we expressly did not pass upon that issue, 286 F. 2d at 129. *Deering Milliken, Inc.* v. *Johnston*, —— F. 2d —— (4 Cir. 1961), lends support to Judge Dimock's position, although it involved the conduct of a hearing rather than of an election directed by the Board.

Williams v. *Fanning, supra*, upheld a suit to enjoin a postmaster from carrying out a fraud order of the Postmaster General. The rule there stated, 332 U. S. at 493-494, is that "the superior officer is an indispensable party if the decree granting the relief sought will require him to take action, either by exercising directly a power lodged in him or by having a subordinate exercise it for him" but not "if the decree which is entered will effectively grant the relief desired by expending itself on the subordinate official who is before the court"; it is immaterial, in the latter event, that the subordinate "would be left under a command of his superior to do what the court has forbidden." This would seem to carry the day for plaintiff save for defendant's contention that the Board is not required to have an election conducted by the regional director, citing §102.69 of its Rules and Regulations—the implication being, we suppose, that a decree against the regional director would not "effectively" grant relief since the Board could circumvent the decree by ordering someone else to conduct the election. We need not consider whether a response that the Board could not do any such thing, since the decree would be *res adjudicata*, would be circular reasoning or not; see 3 Davis, Administrative Law Treatise (1958), pp. 602-603.

For the Supreme Court, when confronted with an essentially similar contention with respect to the need for joining the Commissioner of Immigration and the Attorney General with the District Director in the review of a deportation order, deemed it enough to say, "But we need not decide the effect of such a judgment. We cannot assume that a decision on the merits in a court of appeals on a question of this kind, subject to review by this Court, would be lightly disregarded by the immigration authorities." *Shaughnessy* v. *Pedreiro*, 349 U. S. 48, 53 (1955). Significant also, and quite applicable here, is the Court's statement in that case, "Undoubtedly the Government's defense can be adequately presented by the District Director who is under the supervision of the Commissioner."[9] We hold the members were not necessary parties.

II. *The power of the Board to direct an election.*

Although the appeal is from denial of a temporary injunction, there appears to be no real dispute on factual matters. The case came before the District Judge on plaintiff's application for an injunction and the Board's motion to dismiss the complaint; hence we shall assume for the purposes of this opinion that the facts are as stated above, although the parties will be free to challenge them at a trial on final relief. The issue being one of law, the standard is whether we think the District Judge was wrong, not whether he was "clearly" so, *Carroll* v. *Associated Musicians*, 295 F. 2d 484, 488-489 (2 Cir. 1961), and cases cited.

The defendant's position proceeds from the basis that §9(c) of the Act authorizes direction of an election if the Board has determined that "a question of representation affecting commerce exists"; that "affecting commerce" is

[9] See Notes, Williams v. Fanning Revisited: The Indispensable Superior in Judicial Review of Administrative Actions, 54 Colum. L. Rev. 1128 (1954); The Doctrine of Indispensable Parties as Applied in Review of Administrative Action, 103 U. of Pa. L. Rev. 238 (1954).

defined by §2(7) to mean "in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce"; and that §2(6) defines commerce to include "trade, traffic, commerce, transportation or communication • • • between any foreign country and any State, Territory, or the District of Columbia." *Literally the words cover the case.* Yet the Board would hardly insist that the words apply to everything within their literal reach; we have not heard it suggested that the Board considers its power to extend to the stevedores who load Empresa's ships in Honduras although they are engaged in "commerce" quite as much as the seamen who man them. Neither do we suppose the Board would think it could direct an election among miners employed by a wholly owned subsidiary of an American company abroad, even though the ore was shipped to the United States and American employees of the parent were objecting to what they regarded as unfair wage competition arising from lack of effective organization among the foreign miners, although again the words literally apply. Words are not thus stretched to their literal bounds because statutes relating to international matters are construed in accordance with international usage, *Lauritzen* v. *Larsen*, 345 U. S. 571, 577-579, 581-582 (1953); as was said in regard to another type of labor regulation, "An intention so to regulate labor conditions which are the primary concern of a foreign country should not be attributed to Congress in the absence of a clearly expressed purpose," *Foley Bros., Inc.* v. *Filardo*, 336 U. S. 281, 286 (1949).

The problem of workers directly engaged in transportation is more difficult; the stevedores stay on the piers, the miners remain in the mines, but the seamen come to the United States and return. The Board is right in saying the scope of its power in respect of the latter is not to be determined by the simple notion that a Honduran regis-

tered ship is a floating piece of Honduran territory; that is a mere "figure of speech" whose fictitious character was exposed long ago, *Wildenhus'* case, 120 U. S. 1 (1887); *Cunard SS. Co.* v. *Mellon*, 262 U. S. 100, 123-124 (1923).

Although Article 10 of the Treaty, which requires the United States to recognize Empresa's vessels as vessels of Honduras, also is not the end of our investigation, it surely must be the beginning. As was said with respect to the Jones Act in *Lauritzen* v. *Larsen*, 345 U. S. at 584-585, "Perhaps the most venerable and universal rule of maritime law relevant to our problem is that which gives cardinal importance to the law of the flag" and, more generally, "the weight given to the ensign overbears most other connecting events in determining applicable law." How "cardinal" the importance is and how much "weight" should be given must depend, in the absence of clear expression by Congress, on what other factors of foreign and United States interest are present, and on the nature of the United States statute sought to be applied, taking particular account of the danger that an attempt to apply our law may result in a collision with the foreign sovereign. In the *Lauritzen* case the single United States factor, that Larsen had joined the crew and signed the articles in New York, was adjudged insufficient to tilt the scale against the law of the flag. So also, in *Romero* v. *International Terminal Co.*, 358 U. S. 354, 383-384 (1959), the factor that the injury occurred in New Jersey. On the other hand, in *Gerradin* v. *United Fruit Co.*, 60 F. 2d 927 (2 Cir.), cert. denied, 287 U. S. 642 (1932), this court applied the Jones Act to the American demise-charterer of a Honduran registered vessel, as to an accident on the high seas to an American seaman hired in New York. See also the cases summarized in footnote 3 of the *Lauritzen* opinion, 345 U. S. at 573, and *Bartholomew* v. *Universe Tankships*, 263 F. 2d 437 (2 Cir.), cert. denied, 359 U. S. 1000 (1959).

Decisions in regard to the application of United States statutes dealing with seamen's wages are perhaps more

directly relevant to our problem. A provision of the Seamen's Act of 1915, making it unlawful to pay wages in advance, 38 Stat. 1164, 1169, 46 U. S. C. §599(e), was held inapplicable "when the contract and payment were made in a foreign country where the law sanctioned such contract and payment," even though the statute specifically extended to "foreign vessels while in waters of the United States," *Sandberg* v. *McDonald*, 248 U. S. 185, 194, 195 (1918), see also *Jackson* v. *S.S. Archimedes*, 275 U. S. 463 (1928). On the other hand, the 1920 amendment of §4 of the Seamen's Act, 41 Stat. 1006, 46 U. S. C. §597, granting seamen on United States vessels the right to demand half of their earned wages at every port and making the section applicable to "seamen on foreign vessels while in harbors of the United States," was construed to cover the suit of a British seaman on a British vessel under British articles in the light of a further provision that "the courts of the United States shall be open to such seamen for its enforcement," *Strathearn S.S. Co.* v. *Dillon*, 252 U. S. 348 (1902).[10]

It is with this background that we come to *Benz* v. *Compania Naviera Hidalgo, S.A.*, 353 U. S. 138 (1957). It involved the *SS. Riviera*, owned by a Panamanian corporation, sailing under the Liberian flag, and manned by a foreign crew, principally German and British, who had signed a British form of articles at Bremen, Germany. While the *Riviera* was in Portland, Oregon, loading a cargo of wheat destined for India, crew members struck because of a wage dispute, and picketed the vessel. The picketing was later continued by three American unions. The ship-

[10] The Court thought "the provisions of the act as the same are written" made plain "the purpose of Congress to place American and foreign seamen on an equality of right in so far as the privileges of this section are concerned * * *" 252 U. S. at 355. An abundance of legislative material leading to the same conclusion is summarized in the opinion that Mr. Justice Brandeis had prepared for possible delivery, see Bickel, The Unpublished Opinions of Mr. Justice Brandeis, pp. 35, 47 ff., reprinted in 69 Harv. L. Rev. 1177, 1190 ff. (1956), and *Monteiro* v. *Sociedad Maritima San Nicolas, S.A.*, 280 F. 2d 568, 573-574 (2 Cir.), cert. denied, 364 U. S. 915 (1960).

owner's action, in which federal jurisdiction was predicated on diverse citizenship, sought damages from these unions and their representatives, under Oregon law. The defense was that the Labor Management Relations Act had pre-empted the field; the Supreme Court held the defense unfounded. The opinion, by Mr. Justice Clark, stated, 353 U. S. at 143:

> "Our study of the Act leaves us convinced that Congress did not fashion it to resolve labor disputes between nationals of other countries operating ships under foreign laws. The whole background of the Act is concerned with industrial strife between American employers and employees."

Mr. Justice Douglas dissented on the ground that "The case involves a contest between American unions and a foreign ship"; that since the foreign ship was in competition with American vessels paying higher wages, "American unions • • • have a vital interest in the working conditions and wages of the seamen aboard this foreign vessel"; that the picketing, on American soil, either was or was not a violation of §303(a)(1) or (2) of the Taft-Hartley Act; that "even if we assume *arguendo* that the foreign vessel would not be subject to the regulatory provisions of the Act, it could nonetheless sue under §303(b) to get protection from any unfair labor practice condemned by the Act"; hence Congress had occupied the field, 353 U. S. at 147-150. The only subsequent Supreme Court decision in this area is *Marine Cooks* v. *Panama S.S. Co.*, 362 U. S. 365 (1960). The holding, that the Norris-LaGuardia Act, 29 U. S. C. §§101, 104, deprived a district court of jurisdiction to enjoin an American union from picketing, on American soil, a Liberian ship owned by one Liberian corporation and time-chartered to another and manned by a foreign crew, is without direct application to the problem here. No conflict with foreign governments or foreign laws

is caused if Congress chooses to stay a Federal court from enjoining the picketing in the United States of a foreign flag ship involved in a labor dispute, as it did in the case of ships under our own flag until 1947 and still does so far as private suits are concerned, see *A. H. Bull S.S. Co.* v. *Seafarers' Int'l Union*, 250 F. 2d 326 (2 Cir. 1957). Hence the Court's conclusion that Congress intended the Norris-LaGuardia Act to apply in such a case does not support an inference that Congress intended the same with respect to the National Labor Relations Act—just as it does not show the contrary. However, in disapproving the Court of Appeals' reliance on *Benz* in reaching a contrary result, the Supreme Court said, at p. 369:

> "The question in the *Benz* case was whether the Labor Management Relations Act of 1947 governed the internal labor relations of a foreign ship and its foreign workers under contracts made abroad while that ship happened temporarily to be in American waters. The *Benz* case decided that the Labor Management Relations Act had no such scope or coverage and that it accordingly did not pre-empt the labor relations field so as to bar an action for damages for unlawful picketing under Oregon Law."

The Board seeks to distinguish *Benz* on the ground that it involved no such indirect American ownership and no such regular coming and going from American ports as here. The "labor disputes between nationals of other countries operating ships under foreign laws," there said not to be covered by the Act, would thus not include a dispute where the employer was a wholly-owned subsidiary of an American corporation, also operating ships under our own flag, even when as here the subsidiary had been formed long before controversy arose and none of the ordinary bases for piercing the corporate veil exist, see *In re Gibraltor Amusements, Ltd.*, 291 F. 2d 22 (2 Cir.), cert. denied,

—— U. S. —— (1961). Stress is laid upon the sentence in the *Benz* opinion, "The only American connection was that the controversy erupted while the ship was transiently in a United States port and American labor unions participated in its picketing," 353 U. S. at 142, and upon the reference to "temporarily" in *Marine Cooks.* As against these respects in which the instant case is stronger than *Benz* for the application of the Labor Act, there is at least one in which it may be weaker. As Mr. Justice Douglas pointed out in his dissent, the *Benz* case did not directly involve the application of the panoply of labor regulation embodied in §§7, 8, 9 and 10, but only the provisions of §303 of the Taft-Hartley Act relating to picketing, there wholly on American soil; it is hard to believe that foreign governments would be, or under international practice would have any right to be, concerned with whether the rights of their ships to damages for such picketing were governed by Federal or state law.[11] Here, on the other hand, application of §§7, 8, 9 and 10 of the National Labor Relations Act would involve the risk of continuous conflict between the United States and Honduras with respect to labor conditions which, though of more interest to the United States than those in *Benz*, are still Honduras' "primary concern," 366 U. S. at 286.

The case made by plaintiff's complaint goes far beyond the flying of the Honduran flag, important as *Lauritzen* teaches that to be. In this case there are also the Honduran citizenship of the crews, the employment of the crews in Honduras under Honduran articles, the vessels' regular visits to Honduras, the Honduran corporate identity—admittedly not fictitious—of the owner, the long recognition of and contract with a Honduran union, and the provisions of Honduran law regulating labor matters. Though the

[11] However, the Court may have thought that the liabilities imposed on unions by §303 and the rights conferred by §§7, 8, 9 and 10 must be regarded as a single package, see Note, The Effect of United States Labor Legislation on the Flag-of-Convenience Fleet, 69 Yale L. J. 498, 518-519 (1960).

vessels are engaged in the foreign commerce of the United States, they are also engaged in the foreign commerce of Honduras. The only United States contacts not matched by Honduran ones are United Fruit's stock ownership and its direction and use of the voyages; these are substantially outweighed, for the purpose here at issue, by Honduras' interests.

Although the application of the Jones Act to accidents on foreign registered vessels involves the probability of rules of liability and amounts of recovery different from the law of the flag, as the discussions in *Lauritzen*, 345 U. S. at 575-576 and in *Romero*, 358 U. S. at 358, show, imposition of United States law on the rights of a seaman to recover against a ship owner or operator for personal injury is not likely to involve either party in a breach of contract with a third person or in the violation of a foreign governmental requirement. The occasional application of the antitrust laws to activities abroad has not been without its problems, see *British Nylon Spinners, Ltd.* v. *Imperial Chemical Industries, Ltd.*, [1952] 2 All E. R. 780, 782, 784; *United States* v. *Holophane Co.*, 352 U. S. 903 (1956), even though the activity is usually of relatively small significance to the total economy of the foreign land. Here, on the allegations of the complaint, the conflict between United States and Honduran law would be constant;[12] far from dealing only with incidents while the ships were in American waters, the Board would be regularly applying the shifting standards of its own decisions, and those of American courts and American legislators, to conduct in Honduras, where the bargaining between Empresa and its employees has always taken place;[13] it would be endeavoring

[12] See the discussion in 69 Yale L. J. 498, 514-515 (1960).

[13] A wryly amusing illustration is furnished by the Board's explanation, in its opinion in this very case, fn. 23, that the existing collective bargaining agreement between Empresa and Marineros " is not a bar to this proceeding, assuming it would otherwise be so effective, because the decision herein is issuing after the expiration date of that contract. See: St. Louis Independent Packing Company, 122 NLRB 887, 889." One wonders how fully the Labor Court of Honduras is informed about the NLRB's "contract-bar" rule.

to enforce its will on matters that Honduras, with a better claim, regards as for itself to decide. Compare *Vanity Fair Mills* v. *T. Eaton Co., Ltd.*, 234 F. 2d 633, 646-647 (2 Cir.), cert. denied, 352 U. S. 871 (1956). The situation here differs sharply from the United States' informing itself as to contracts relating to the movement of traffic between the United States and a foreign country, *Kerr SS. Co.* v. *United States*, 284 F. 2d 61 (2 Cir. 1960); *Montship Lines, Ltd.* v. *Federal Maritime Board*, 295 F. 2d 147, 153 (D. C. Cir. 1961), or even taking action with respect thereto, *Thomsen* v. *Cayser*, 243 U. S. 66 (1917). The case is appropriate for application of Mr. Justice Jackson's warning that "in dealing with international commerce we cannot be unmindful of the necessity for mutual forbearance if retaliations are to be avoided; nor should we forget that any contact which we hold sufficient to warrant application of our laws to a foreign transaction will logically be as strong a warrant for a foreign country to apply its law to an American transaction," 345 U. S. at 582. We realize that if the Labor Act is inapplicable, owners of foreign flag ships such as Empresa will be deprived of the protection against certain unfair labor practices by the Federal courts accorded employers subject to the Act by such provisions as §10(1) and §303; but the practical consequences of this are less serious than those of a contrary holding. At least so the owners think, with the apparent concurrence of the Supreme Court in *Benz*.

Our belief that the Labor Act should not be held applicable in a case such as this is reinforced by the Geneva Convention on the High Seas, ratified by the United States on March 24, 1961, but not yet effective for lack of required ratification by 22 nations. Article 5, §1, of the Convention reads:

> "Each State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships

> have the nationality of the State whose flag they are entitled to fly. There must exist a genuine link between the State and the ship; in particular, the State must effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag."

Discussion seems to have been centered on what happens if the "genuine link" does not exist;[14] neither the text nor such explanatory materials as we have found say specifically what happens if the conditions of the final sentence are met. Yet, since it was deemed so important to insist upon the existence of a "genuine link" and the flag state's effective exercise of "jurisdiction and control in administrative, technical and social matters over ships flying its flag," it would be unreasonable to conclude that when all this had been done other states do not owe some obligations of respect.[15]

Three other matters ought be mentioned before we conclude:

(1) We have not discussed the conflicting contentions as to the effect of Article 22 of the Treaty with Honduras, quoted in footnote 4—plaintiff arguing that application of the Labor Act would violate the first clause, particularly

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[14] The "genuine link" requirement as adopted was less stringent than proposals made by such governments as the United Kingdom and the Netherlands and by the International Labor Conference, "which would have enabled states other than the flag state to withhold recognition of the national character of a ship if they considered that there was no 'genuine link' between the state and the ship." Report of the Committee on Foreign Relations to the Senate, 106 Cong. Rec. 10382 (1960). The Senate was told that the effect of the language as adopted in Geneva is that "no state can claim the right to determine unilaterally that no genuine link exists between a ship and the flag state," but "Nevertheless, there is a possibility that a state, with respect to a particular ship, may assert before an agreed tribunal, such as the International Court of Justice, that no genuine link exists. In such event, it would be for the Court to decide whether or not a genuine link existed." *Id.*

[15] Although the Geneva Convention has not yet become effective, a convention representing such a consensus of thought by the leading maritime nations should be given weight by a United States court as evidence of international practice, especially after ratification by this country.

in the light of the Supreme Court's statement in *Marine Cooks* quoted above, and defendant contending that the matter is one of "the execution of contracts" as to which the final sentence permits the application of "local laws." The problem is not an easy one; the view we take of the instant case makes it unnecessary for us to decide it.

(2) We realize that American unions understandably desire to organize vessels which they conceive to be in substance a part of this country's merchant marine, and that attempts to implement that desire can lead to a breach of the industrial peace which the Board is bound to promote, particularly when, as here, the stockholder of the foreign flag ships operates American flag vessels as well. Last summer's strike of the American merchant marine, with which we have some familiarity, see *United States* v. *National Marine Engineers Beneficial Assn.*, 294 F. 2d 385 (2 Cir. 1961), sufficiently demonstrates this. Therefore, we recognize that a controversy between an American union and Empresa could lead or tend to lead "to a labor dispute burdening or obstructing commerce or the free flow of commerce" carried on by American flag ships, as well as directly obstructing commerce carried on by foreign ones. However, that scarcely is decisive—the question still is how far Congress intended to permit the Board to intervene in what would normally be the affairs of a foreign government in order to prevent this. Even if we were to make the unrealistic assumption that Congress was so far-seeing as not only to have contemplated the growth of flags of convenience when it adopted the Labor Act in 1935,[16] but

[16] The use of "flags of convenience" by United States' enterprises is said to have begun in an effort to make what had been American ships available for the transportation of needed cargoes to powers resisting Nazi aggression despite the Neutrality Act of 1939, 54 Stat. 4, 6 Benedict, Admiralty (1958), 219-220; Note, Pan-Lib-Hon Registration of American-Owned Merchant Ships: Governmental Policy and the Problem of the Courts, 60 Colum. L. Rev. 711, fn. 1 (1960). It has continued for economic reasons. See Note, The Effect of United States Labor Legislation on the Flag-of-Convenience Fleet, 69 Yale L. J. 198 (1960). The letter of the Secretary of Defense attached to the Attorney General's brief to the NLRB indicated that, as of 27 September 1960, the dead-weight tanker tonnage available to the United States under "Panlibhon" (Panama, Liberia, Honduras) registry was some 120%, and the general cargo tonnage some 40% of the United States flag tonnage.

also to have anticipated cases where an American company would operate some ships under our own flag and others through foreign subsidiaries flying the flags of other countries, we see no basis for believing Congress would have chosen to solve the problem by an exercise of jurisdiction which would create such a conflict with a foreign government as would seem inevitable here. Mr. Justice Clark's statement in *Benz*, 353 U. S. at 147, seems exceedingly apposite:

> "For us to run interference in such a delicate field of international relations there must be present the affirmative intention of the Congress clearly expressed. It alone has the faculties necessary to make fairly such an important policy decision where the possibilities of international discord are so evident and retaliative action so certain."[17]

(3) In order to avoid any possible misunderstanding in this controversial area, we emphasize that we are deciding only the case before us; what the result should be when the contacts of the country of the flag are weaker relative to those of the United States than here, we do not say.[18]

The order denying a temporary injunction is reversed.

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[17] The Secretary of Labor has announced the creation of a three-man review board to study the flag of convenience controversy, N. Y. Times, Sept. 20, 1961, p. 47, col. 6.

[18] The Board decisions include *West India Fruit and Steamship Co., Inc.*, 130 NLRB No. 46, an unfair labor practice case now pending, on petition to review, in the Fifth Circuit; *Peninsular & Occidental SS. Co.*, 132 NLRB No. 1, also an unfair labor practice case; *Eastern Shipping Corp.*, 132 NLRB No. 72, and *Hamilton Bros., Inc.*, 133 NLRB No. 85, both representation cases. *Navios Corp.* v. *National Maritime Union*, 402 Pa. 325, 166 A. 2d 625 (1960), cert. denied, 366 U. S. 905 (1961), and *Incres Steamship Co., Ltd.* v. *International Maritime Workers Union*, 10 N. Y. 2d 218, 219 N. Y. S. 2d 21, cert. granted, —— U. S. —— (1961), involved the applicability of state laws with respect to picketing, as against claims of federal preemption.

APPENDIX D.

Opinion of District Court for Southern District of New York.

CIV MO 228 OPIN 180

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

EMPRESA HONDURENA DE VAPORES, S. A.,
Plaintiff,
against
IVAN C. MCLEOD, Regional Director for the Second Region of the NATIONAL LABOR RELATIONS BOARD,
Defendant.

61 Civil 4413

PALMIERI, J.

This is a motion[1] for a preliminary injunction restraining defendant[2] from carrying out an order of the National Labor Relations Board (Board) directing a representation election among the unlicensed seamen employees of

[1] The motion was brought by an order to show cause submitted Wednesday and returnable late in the afternoon of the Thursday preceding the Sunday on which the election was scheduled to commence, thus giving the adverse parties little time in which to respond and forcing the Court to decide the complex questions of jurisdiction and injunctive relief under pressure of severe time limitations. Considering that the Board issued its order on November 17, 1961, and the plaintiff knew elections were scheduled to commence within 30 days thereof, this long delay in bringing the motion is unfortunate, particularly since the time was found to prepare printed motion papers.

[2] Only the Regional Director of the Second Region of the National Labor Relations Board is named as a defendant. It is clear that his responsibilities entail only the mechanics of executing the Board's direction of election. Whether fully effective relief requires the Court's order to reach the Board itself, and whether the members of the Board are indispensable parties to the action, are questions unnecessary to determine, in view of what follows.

Empresa Hondurena de Vapores, S. A. (Empresa). A complaint seeking permanent injunctive relief was filed simultaneously with the motion papers.

The election has been ordered to commence on December 17, 1961, on vessels owned or operated by plaintiff upon their arrival in United States ports and by mailing ballots to employees not aboard vessels scheduled to arrive in the United States between December 17, 1961 and January 31, 1962. Plaintiff is a Honduras corporation, operating vessels registered under the laws of Honduras and carrying the Honduran flag. The unlicensed seamen employed by plaintiff are, with the exception of one who is a citizen of Jamaica, all citizens of Honduras and, with the exception of four, all residents of Honduras. All are also members of a Honduran labor union, Sociedad Nacional de Marineros de Honduras,[3] which is certified by the Ministry of Labor of Honduras. Empresa is, however, a wholly owned subsidiary of United Fruit Company (United Fruit), a New Jersey corporation with its principal place of business at Boston, Massachusetts. Since the formation of Empresa it has, with few possible exceptions, chartered all its vessels to United Fruit which uses them, for the most part, to carry produce of United Fruit's Latin American operations. It is the plaintiff's position that the Board, in making the order here in question, exceeded its powers under the Labor Management Relations Act of 1947, 29 U. S. C. Chapter 7, inasmuch as this Act has been held by the Supreme Court of the United States[4] to be inapplicable to labor relations between nationals of foreign countries operating vessels

[3] This union did not permit its name to be placed on the ballot. Another Honduras union, Sindicato Maritimo Nacional de Honduras, "Sindimar", the National Maritime Union of America, AFL-CIO, and "no union", are the three choices offered by the proposed ballot.

[4] *Benz* v. *Compania Naviera Hidalgo, S. A.*, 353 U. S. 138 (1957); *cf. Marine Cooks & Stewards* v. *Panama S. S. Co.*, 362 U. S. 365 (1960); *Afran Transport Company* v. *National Maritime Union*, 169 F. Supp. 416 (1958); *Bobolakis* v. *Compania Panamena Maritima San Gerassimo*, 168 F. Supp. 236, 238 (1958).

under foreign laws and their foreign workers. The plaintiff urges, in addition, that the Board's direction that the representation election be held, presents a substantial Constitutional question; that such action is in contravention of treaty obligations with the Republic of Honduras and therefore violative of Article VI of the Constitution.[5]

THE JURISDICTION OF THIS COURT TO GRANT THE RELIEF REQUESTED BY THE PLAINTIFF.

At the very outset, it is necessary to consider the Board's objection that this Court lacks jurisdiction over the subject matter of this action. The objection is based upon the proposition that an employer is not entitled to invoke the jurisdiction of a federal district court to review the Board's direction of a representation election because an adequate and exclusive statutory method of obtaining judicial review by the appropriate Court of Appeals has been provided.[6]

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[5] Article VI of the Constitution provides, in pertinent part, as follows:

> "This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; . . ."

Assuming there is a conflict between the Board's action, properly exercised pursuant to the Labor Management Relations Act of 1947, and the Treaty of Friendship, Commerce, etc. between the United States and Honduras, dated December 7, 1927, 45 Stat. 2618 (1927), an interesting legal question is posed. It does not follow, however, that Congress' Constitutional powers are diminished by the prior treaty commitments of the United States. Since neither has intrinsic superiority over the other, the later Congressional enactment should prevail. *Leges Posteriores priores contrarias abrogant* see *Edye* v. *Robertson* (Head Money Cases), 112 U. S. 580, 598-599 (1884); *Taylor* v. *Morton*, 23 Fed. Cas. No. 13,799 (1855); *cf. Cook* v. *United States*, 288 U. S. 102 (1933).

[6] 49 Stat. 454 (1935) as amended, 29 U. S. C. §160 (e), (f) (1952) provides that "Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any Circuit Court of Appeals where the unfair labor practice in question was alleged to have been engaged in." This is the only provision for judicial review in the Act. The procedure for review of certification proceedings is set forth in §9 (d) providing that whenever an order of the Board is made pursuant to an unfair labor practices hearing and there is a petition for enforcement or review of the order by the court of appeals, the Board's certification is to be included in the transcript, and the validity of the whole representation determination is then open to judicial examination.

The plaintiff, on the other hand, relies on the frequently cited and much discussed decisions in *Leedom* v. *Kyne*, 358 U. S. 184 (1958); and *Fay* v. *Douds*, 172 F. 2d 720 (2d Cir. 1949).

On the one hand there can be no doubt that the Labor Management Relations Act of 1947 manifested a clear Congressional recognition that to achieve the statute's basic policy of promoting collective bargaining dilatory litigation had to be avoided; that a restriction of the scope and method of review of labor determinations tended to achieve this result; and that such restriction tended to promote the efficient functioning of the Board as well.[7] Thus, it has come to be generally recognized that Board determinations in representation proceedings are not reviewable by district courts under their general equity jurisdiction.[8] But this generally settled rule is subject to two exceptions—those established by the two decisions upon which the plaintiff relies. The nature of these exceptions and their impact upon the general rule were succinctly explained by Judge Friendly in a recent opinion, *Local 1545, Carpenters* v. *Vincent*, 286 F. 2d 127, 129-130 (2d Cir. 1960):

> "Subsquently, two exceptions to this general rule excluding District Court jurisdiction to enjoin Board directions in representation matters have been recognized. The first was this Court's decision in *Fay* v. *Douds*, 2 Cir., 1949, 172 F. 2d 720, 723, relating to cases where the plaintiff advances a claim of denial

[7] See the Legislative History of the Labor Management Relations Act, 1947. (G. P. O. 1948); *Leedom* v. *Kyne*, 358 U. S. 185, 191-194 (1958); *American Federation of Labor* v. *National Labor Relations Board*, 308 U. S. 401, 405-411 (1940); *Fitzgerard* v. *Douds*, 167 F. 2d 714, 716-717 (2d Cir. 1948).

[8] *Local 1545, Carpenters* v. *Vincent*, 286 F. 2d 127 (2d Cir. 1960); *McLeod* v. *Local 476*, 288 F. 2d 198 (2d Cir. 1961); *Leedom* v. *International Brotherhood of Electrical Workers*, 278 F. 2d 237 (D. C. Cir. 1960); *National Biscuit Division* v. *Leedom*, 265 F. 2d 101 (D. C. Cir. 1959), *Arb. denied*, 359 U. S. 1011 (1959).

> of constitutional rights, in that case lack of procedural due process, which is 'not transparently frivolous.' Thereafter a second exception was announced, first by the Court of Appeals of the District of Columbia and later by the Supreme Court, in *Leedom* v. *Kyne*, 1957 101 U. S. App. D. C. 398, 249 F. 2d 490, 1958, 358 U. S. 184, 79 S. Ct. 180, 3 L. Ed. 2d 210, where the Board had acted in direct and in that case conceded contravention of a specific mandate of §9, there §9 (b) (1)."

Since there is no claim here of the Board's violation of any statutory mandate, the *Leedom* v. *Kyne* exception does not apply. But there is present in this case the assertion of the deprivation of several Constitutional rights. Only one need be referred to since it is plainly one which is "not transparently frivolous."[9] It is urged not only by the plaintiff, but by the Attorney General of the United States when he intervened before the Board in these proceedings as *amicus*. At page 11 of his brief he stated:

> "A refusal to treat merchant vessels flying the flag of Liberia and Honduras as vessels of those nations would be in direct conflict with our treaty obligations and would, as the Under Secretary of State has pointed out in his letter of October 27, 1960, to the Attorney General, a copy of which is included as Appendix A, create serious difficulties in our foreign relations not only with nations signatory to these treaties but with other nations, such as Panama, which would be entitled to interpret a refusal to recognize the flag of the ship as a violation of the

[9] This language is that of Judge Learned Hand, writing for the unanimous Court in *Fay* v. *Douds* 172 F. 2d 720, 723 (2d Cir. 1949):

> "If this assertion of constitutional right is not transparently frivolous, it gave the District Court jurisdiction; and, having so acquired jurisdiction, the court might, and should, dispose of all other questions which arose, even though they would not have been independently justiciable."

> rules of international law upon which there had been mutual reliance."

Moreover, the Attorney General appended to his brief a communication from the Department of State signed by Under Secretary Douglas Dillon, dated October 27, 1960, expressing the Department's interest in these proceedings "based upon the important foreign relations considerations involved" and added, in part, as follows (p. 24 of Attorney General's brief):

> "The Department of State believes that a proper reading of these Treaties requires that vessels under the flag of Liberia and Honduras and carrying the papers required by the national laws of these countries in proof of nationality, be recognized by the United States Government or any agency thereof as having the nationality of those countries. Therefore, the Department considers that any action by the Board purporting to consider such vessels as United States flag vessels, would be subject to a charge of violation of the above international agreements."

I cannot go so far as to say that a treaty violation may occur. It would seem sufficient, on the jurisdictional aspect of this case, to point out the formal assertions of important officials of the executive branch of the Government which tend to substantiate the plaintiff's claim on this point. I conclude therefore that there is present in this case one of the two grounds set forth by Judge Friendly permitting the assertion of jurisdiction by the District Court.

The Plaintiff's Entitlement to Injunctive Relief.

Assuming the valid assertion of jurisdiction by the District Court, I shall now deal with the considerations affect-

ing the disposition of plaintiff's request that it be granted threshold injunctive relief. At the outset, I am not convinced of the probability of the plaintiff's success in sustaining the legal contentions of this case. I am constrained to note that although the Attorney General intervened before the Board, he has been silent before this Court. It may be, as the Board urges, that the Attorney General believes that resort to the Court is, in any event, premature because the election sought to be enjoined is an interlocutory step in a representation proceeding, and it may lead nowhere if neither union wins. It is only if one of the two unions on the ballot wins, and is certified by the Board as the collective bargaining representative that plaintiff will be placed under a legal obligation to bargain. And even in this contingency, the legal obligation is not enforceable until reviewed by the appropriate Court of Appeals as already stated. The plaintiff's assertions of immediate and irreparable damage by the holding of the election, without more, are unproved and unconvincing. It is not possible, on the record before me, to conclude that the plaintiff will suffer irreparable harm solely as a consequence of the holding of the election. I feel constrained to conclude that the interests of the many parties involved, particularly in the light of the lengthy and painstaking inquiry by the Board, do not justify the grant of the drastic threshold sanction invoked by the plaintiff.

Accordingly, the plaintiff's motion for a preliminary injunction is denied. It is so ordered.

EDMUND L. PALMIERI
U. S. D. J.

Dated: New York, N. Y.
December 16, 1961

APPENDIX E.

Decision and Direction of Election of NLRB and Dissenting Opinion.

UNITED STATES OF AMERICA

BEFORE THE

NATIONAL LABOR RELATIONS BOARD

UNITED FRUIT COMPANY *and* NATIONAL MARITIME UNION OF AMERICA AFL-CIO	Case No. 2-RC-10379 Corrected Decision Pursuant to Order Dated 11/30/61

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, a hearing was held before Jacob Lazarus, hearing officer. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Upon the entire record in this case,[1] the Board finds:

[1]On May 31, 1960, the Board held a consolidated hearing for purposes of oral argument in *West India Fruit and Steamship Company Inc.*, 130 NLRB No. 40; *Peninsular & Occidental Steamship Company*, 132 NLRB No. 2, and *Eastern Shipping Corporation*, 132 NLRB No. 72; on certain issues concerning the jurisdiction of the Act over ships flying the flags of nations other than the United States and concerning policy considerations involved in the Board's assertion of jurisdiction over such vessels. Similar issues are raised in this proceeding. Thus, as it appeared that United Fruit Company, the Petitioner, and Sociedad Naccional De Marinos Honduras, a Honduran organization, might have a substantial interest in the outcome of the *West India* and other cases referred to above, they were invited to participate as *amicus curiae* in the oral argument. Only the Petitioner accepted the invitation and appeared by counsel at the hearing. See, *West India Fruit and Steamship Company*, *supra*, pp. 1-2, footnote 5.

As set forth in our decision in the *West India* case, *supra*, p. 2, fn. 4, the Attorney General of the United States was permitted to intervene in this and the other three cases referred to above and in his brief, filed on November 18, 1960, presented on behalf of the Department of State and Department of Defense certain considerations of international law and national defense policy bearing upon issues common to the four cases.

Decision and Direction of Election of NLRB and Dissenting Opinion.

1. The Petitioner seeks a single fleet-wide unit of all unlicensed seamen employed aboard certain Honduran flag vessels which it alleges are beneficially owned and controlled by the United Fruit Company; here called UFCO, through its wholly owned foreign subsidiaries, Empresa Hondurena de Vapores, S. A.[2] and Balboa Shipping Corporation. UFCO contends that it is not, as alleged, the employer of the seamen involved and neither owns nor, as a time-charterer, operates the ships covered by the petition. Both UFCO and Empresa argue basically that as Empresa is a foreign corporation, is the employer of the seamen, and is engaged in its own business of operating and chartering the vessels, and as the vessels are of Honduran registry and the seamen of foreign nationality, the maritime operations involved are not within the jurisdiction of the Labor Act. Thus, the issue raised here concerns not only the effect upon the Act's jurisdiction of the foreign aspects adhering to Empresa's maritime operations, but also a determination of the relationship of Empresa and its operations to UFCO and its shipping trade.

As for the companies' arguments based upon the flag law and other international law doctrine and upon certain treaties and conventions between the United States and Honduras, such matters were dealt with at length in the Board's decision in *West India*. It was there concluded that the presence of such matters does not necessarily preclude the Act's coverage of a given maritime operation.[3] Similarly in the *Peninsular and Occidental*[4] and in the *Eastern Ship-*

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[2] Empresa Hondurena de Vapores, a Honduran Corporation, moved to intervene on the ground that it was the employer of the employees covered by the petition. Empresa was, without opposition, permitted to intervene at the hearing and has participated fully at all stages of this proceeding.

134 NLRB No. 25.

[3] The treaty and counsular conventions with Honduras are substantially the same as those with Liberia considered in the *West India* decision at pp. 19-21.

[4] 132 NLRB No. 1, at 5.

ping[5] cases it was held that the foreign incorporation of the legal owner and operator of a vessel and apparent employer of its crew did not alone take the vessel beyond the reach of the Act's jurisdiction.

However, none of these cases supports the proposition, in effect urged upon us here by the Petitioner, that underlying stock or other beneficial ownership and, thus, ultimate control of a foreign corporation and its operations by domestic United States interests necessarily bring the foreign corporation or its operation within the coverage of the Act. We do not read the Act as necessarily following United States investments abroad. It is the commerce of this nation, not of foreign nations, with which the Act is concerned. Also we are aware that international seaborne commerce will by its very nature involve insofar as this nation is concerned trade or transportation between foreign nations and a State. Nothing in the Act or relevant cases suggests, however, that all seaborne commerce reaching our ports on regular runs or sporadically is within the Act's coverage irrespective of other aspects of the operations.[6] In following the Supreme Court's *Lauritzen* decision,[7] the Board has pointed out that the test of jurisdiction given commerce literally within Section 2(6) is whether there exist substantial contacts between the "foreign" maritime operation and important United States interests.[8] Rather the problem is one of evaluating the many aspects of the operation and determining whether or not the shipping involved is essentially that of this nation and not that of a foreign nation which the exigencies of international trade

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[5] 132 NLRB No. 72, at 5-6.

[6] See, *Benz* v. *Compania Naviera Hidalgo, S. A.*, 353 U. S. 138 (1957); also *Lauritzen* v. *Larsen*, 345 U. S. 571, 581 (1952).

[7] *Lauritzen* v. *Larsen*, *supra*.

[8] E.g., *West India*, *supra*, p. 15; *Eastern Shipping Corporation*, *supra*, at 2.

[9] *West India*, *supra*, 15; *Eastern Shipping Corporation*, *supra*, p. 6.

have brought in contact with the United States.[10] Such a view clearly lends itself to the result that a foreign maritime operation can retain its essentially foreign nature and remain the commerce of a foreign nation outside the coverage of the Act despite underlying United States interests and certain commercial contacts with this country. At the same time, this view looks beyond the formal foreign aspects to determine if the maritime operation is in fact one primarily based in and operating out of the United States or essentially an adjunct of a domestic corporation's operations in the international trade of the United States; and, thus, is the shipping of this nation and, consequently, covered by the Act. It follows, as we emphasized in our *West India* decision (at pages 21 and 31) and as we reemphasize here, that the particular flag or nationality of the vessels involved, as such, plays no role in our determinations. Whether the flag or nationality be from our own hemisphere or across the seas, the controlling criteria are the same.

It is in the light of these considerations that we must approach the facts and issues before us in deciding the jurisdictional question. UFCO is a New Jersey corporation with its principal place of business at Boston, Massachusetts. Of its approximately 8.7 million outstanding shares of stock, over 8.5 million are owned by citizens of the United States. Its business interests extend world-wide and involve a rather diverse group of activities. However, it is primarily concerned with the raising of bananas, sugar, cacao and other tropical produce and with their transportation to market and sale. The bulk of its trade is between Central and South American locations and United States ports, and the value of its imports into this country exceed one million dollars annually, and are carried in large part

[10] Thus, in both the *Eastern Shipping* case at p. 5 and in *Hamilton Bros.*, 133 NLRB No. 85, p. 3, the Board noted in finding the Act applied that the U. S. contacts present were not just the result of the foreign seaborne trade of a truly foreign venture.

on ships either owned or chartered by UFCO, including those subject of the present petition.

Though it is an operating company, UFCO also to a large extent carries out its operations through some fifty to sixty subsidiaries, many of which are foreign corporations such as Empresa, the subsidiary involved in this proceeding. The primary purpose of UFCO's operating through subsidiaries is to achieve, as its vice-president explained in his testimony, a decentralized control of the companies' many activities in which the subsidiaries, more or less specializing in particular types of undertakings, deal with the the day-to-day problems of their operations while over-all policy and development control resides in the parent company. The extent and nature of that control is the subject of sharp disagreement between the Petitioner and the companies. But the record shows that, though day-to-day operations are in fact handled by the subsidiaries themselves, long-range plans concerning expansion, contraction or other changes in the operation of subsidiaries are generally controlled by UFCO, and its decision with respect to such matters is based not so much upon the needs or advancement of the subsidiaries as independent corporations, but rather upon the needs and planned development of UFCO's overall business in the production, transportation and sale of tropical produce.

Empresa is, as noted, one of UFCO's wholly-owned subsidiaries. It was organized under the laws of Honduras in 1941 by UFCO which supplied the capital for the venture. Empresa's officers are elected by its directors who are in turn elected by the sole stockholder, UFCO. There are, however, no interlocking directors with, or officers common to, Empresa and its parent. Furthermore, Empresa maintains all its own records, holds real estate in its own name, and otherwise appears to function as a distinct corporate entity. It is engaged in the business of owning and operating vessels registered under the laws of Honduras.

However, it does not carry passengers or cargo on its own account. Rather, since its incorporation it has time chartered all its vessels and its income from its maritime operations, which exceeds $400,000 annually, is derived wholly from the charter fees. But Empresa does not, as the record shows, hold itself out to the shipping world generally as being engaged in the business of chartering vessels. On the contrary, since its formation its business has been limited with but a few possible exceptions[11] to chartering its vessels to UFCO, and the seventeen ships under its control at the time of the hearing and which are the subject of the petition[12] were so chartered.

As the owner and operator of the vessels under time charter, Empresa must provide ships that are fully equipped and ready to put to sea. Thus, it is responsible not only for the physical condition of the ships[13] and for provisioning them,[14] except for fuel, but also for hiring the

[11] It was stated in the record by several Company witnesses that Empresa chartered its vessels to UFCO and no other company. However, an exhibit shows that certain of the vessels had, on relatively rare occasions, been under charter to companies unrelated to UFCO; but, whether Empresa itself had so chartered the vessels or whether they were in fact rechartered by UFCO to the stranger companies does not appear. In either event, it remains clear that Empresa does not look to the general shipping market but rather to UFCO for the chartering of its vessels.

[12] Empresa owned 14 of these vessels. Three were owned by Balboa Shipping Corporation, a Panamanian Corporation wholly owned by UFCO. Empresa is the managing agent of such vessels which, like its own ships, fly the Honduran flag. Balboa is not at this time directly involved with the operation of its three vessels which are, for all practical purposes, as fully under Empresa's control as are its own vessels. As Empresa's control over the vessels of Balboa appears to be the same as that over its own vessels, it is unnecessary for the purposes of this decision to distinguish between the two groups of vessels. We note, moreover, that it is not contended that jurisdiction over Balboa's vessels turns on factors other than those also applicable to Empresa and its vessels.

[13] Empresa is responsible not only for day-to-day upkeep of the vessels but also for having the ships drydocked and repaired. Both are usually done in the United States. However, betterments for vessels or the purchase and scrapping of vessels are matters usually falling within the over-all policy control of UFCO.

[14] Supplies are purchased both in foreign nations and the United States. Most of what it buys in this country is purchased from Maratrop Trading Corporation, a wholly owned UFCO subsidiary.

officers and crews[15] and handling all matters concerning terms and conditions of employment including payment of wages and discipline of the personnel.[16] There is nothing in the record to suggest that Empresa does not in fact carry out these typical responsibilities of the owner of a vessel under a time charter.

UFCO, as the time charterer of the vessels, determines what voyages they shall make, their ports of call, their length of stay in various ports, and what cargos they shall carry. In exercising its control, UFCO deals directly with the captain of the vessel involved. If it is dissatisfied with the handling of a vessel by its officers or crew or with its mechanical or other condition, it directs its complaints directly to Empresa, which is responsible for making any necessary changes. The ships are used for the most part, to carry produce of UFCO's Latin American operations,[17] and on any given trip may call at ports in various Central and South American countries including those of Honduras. As the bulk of the trade is between such countries and the United States, the vessels regularly call at the ports of this nation. On their return trips to Latin America the ships carry cargo for various UFCO subsidiaries and also general cargo for shippers and consignees outside the UFCO organization.

The record further shows that the Empresa vessels are wholly integrated in UFCO shipping operations. Thus, UFCO bareboat charters from one of its U. S. subsidiaries or owns outright a number of cargo ships registered under the laws of the United States. These ships, like Empresa's, are under the jurisdiction of UFCO's Marine Division, and

[15] The crews are hired in Honduras, are composed almost wholly of citizens of that country, and sign Honduran shipping articles.

[16] Empresa, as part of its control over personnel, has bargained with a Honduran organization as the representative of the crews of its vessels. See below, fn. 22.

[17] Some, if not all, of the ships also carry passengers.

the two groups of vessels are used interchangeably, carrying the same types of cargos and calling at the same ports, both domestic and foreign. In assigning a vessel to a particular run, the determination as to which vessel to use is based on its availability, size and speed, not on its ownership or flag.

The facts, outlined above, show that the maritime operations before us come literally within the Act's definition of commerce as they encompass in large part, transportation and trade between foreign countries and States of this nation. They further demonstrate that the relationship between UFCO and Empressa is one in which the affairs of the subsidiary are designed essentially to further the shipping operations of the parent and not one in which Empresa is considered an independent undertaking whose success or failure is gauged by its role in the open market. Supporting this conclusion are, *inter alia*, (1) that Empresa's capital expenditures and other substantial changes in operations are tied to UFCO's sea-going transportation needs, both present and projected, (2) that Empresa, with but few possible exceptions, time-charters its vessels to UFCO only and does not look to the open market for business, and (3) that Empresa's vessels are utilized by UFCO as an integral and necessary part of its fleet of vessels and not chartered as an alternative to acquiring vessels elsewhere or only to meet particular contingencies that may arise.[18] Thus, the record shows that Empresa's maritime operations are a part of a single integrated maritime operation under the continuous, direct control and either direct or ultimate

[18] In the situation where it or its subsidiaries' vessels cannot meet its needs, UFCO charters vessels from outside its family of companies. Also, it might be noted here that, in its annual reports, UFCO refers to the vessels involved in this proceeding as its own vessels and notes that certain vessels for foreign flag operations were built to its specifications, and so forth. There is nothing in such reports to indicate that UFCO considers the foreign flag vessels to be other than its own or to be otherwise than completely under its control.

ownership of UFCO and are an essential part of a seagoing enterprise located in and directed from the United States and engaged in the commerce of this nation as described in Section 2(6) of the Act. It is also evident, and we find, that Empresa through its immediate authority and control over hiring and other terms and conditions of employment and UFCO through its control of Empresa and of the vessels and their operations are joint employers of the employees covered by the petition.[19]

We find, further, under the circumstances here that the maritime operations before us possess those substantial United States contacts which, under our decision in *West India*,[20] bring them within the jurisdictional coverage of the Act, despite the foreign registry of the vessels, Empresa's foreign incorporation, and the other foreign aspects present.[21] Accordingly, we conclude that Empresa and UFCO and their maritime operations subject of the petition are in, and affect, commerce within the meaning of Sections 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction in this proceeding. Thus, the companies' motions to dismiss on jurisdictional grounds are denied.

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[19] In so finding, we are not holding that a time charterer of a vessel is necessarily a joint employer of the vessel's crew irrespective of the other attendant facts.

As Balboa Shipping Corporation does not operate its three vessels time chartered to UFCO and does not hire or otherwise deal with the seamen on such vessels or affect their terms and conditions of employment and as Empressa has, as noted, authority over such matters, Balboa is not under the present arrangement an employer of the seamen on its vessels.

[20] 130 NLRB No. 46, pg. 14-15. Clearly, the United States contacts derive from the fact that the maritime operations involved are those of a domestic corporation. They are not the result of the international operations of a truly independent foreign maritime venture.

[21] See, also, *Peninsular & Occidental Steamship Co., supra; Eastern Shipping Corporation, supra;* and *Hamilton Bros., Inc., supra.*

2. The labor organizations involved claim to represent certain employees of the Employers.[22]

3. A question affecting commerce exists concerning the representation of certain employees of the Employers within Section 9(c)(1) and Section 2(6) and (7) of the Act.[23]

4. The following employees of the joint employers constitute a unit appropriate for the purposes of collective bargaining within Section 9(b) of the Act: all seamen employed upon the vessels owned or managed by Empresa Hondurena De Vapores, S. A., and jointly operated by the Employers, excluding guards, masters, other licensed officers, and all other supervisors.[24]

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[22] Following the close of the hearing in this case, Sindicato Maritimo Naccional De Honduras "Sindimar" sought to intervene in this proceeding on the basis of a card showing of interest. The Petitioner contends the request for intervention was not timely. We disagree, for the cards submitted in support of intervention were dated prior to the time of the close of the hearing. As we find that "Sindimar" is a labor organization, the motion to intervene is hereby granted. See, *Hamilton Bros. Inc.*, 133 NLRB No.

Sociedad Naccional De Marineros De Honduras was listed in the petition as the bargaining representative of the employees in the alleged appropriate unit and the record shows that, at the time of the hearing, a contract between Sociedad Naccional and Empresa covering the employees was then in effect. Copies of the petition, of the notice of hearing, and other formal papers were not served on Sociedad Naccional. However, on June 7, 1961, the Board issued a notice, served on the parties and Sociedad Naccional, in which, *inter alia*, it accorded that organization a right to intervene and state its position on the issues by filing within 25 days a "Statement of Intervention" and a brief. As Sociedad Naccional did not reply to the notice, we conclude it is not interested in being a party to this proceeding, and we therefore do not consider it to be one.

[23] We find contrary to the contention of Empresa that its contract with Sociedad Naccional in effect at the time the petition was filed but expiring in April 1961 is not a bar to this proceeding, assuming it would otherwise be so effective, because the decision herein is issuing after the expiration date of that contract. See: *St. Louis Independent Packing Company*, 122 NLRB 887, 889.

[24] The unit appears substantially as requested by the Petitioner. Empresa and UFCO did not contend the unit is inappropriate in either scope or composition, but object to the unit on the grounds considered above and found without merit, i.e. that UFCO is not an employer of the employees and that the Board is without jurisdiction in this case.

Decision and Direction of Election of NLRB and Dissenting Opinion.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted among the employees in the unit found appropriate, as early as possible, but not later than 30 days from the date below. The Regional Director for the Region where this case was heard shall direct and supervise the election, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than twelve (12) months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period and employees engaged in a strike who have been discharged for cause since the commencement thereof, and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether they desire to be represented for collective bargaining purposes by National Mari-

time Union of America, AFL-CIO; or by Sindicato Maritimo Naccional De Honduras, "Sindimar;" or by neither.

Dated: Washington, D. C.
November 15, 1961

FRANK W. McCULLOCH, Chairman

BOYD LEEDOM, Member

JOHN H. FANNING, Member

GERALD A. BROWN, Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

PHILIP RAY RODGERS, MEMBER, dissenting:

For the reasons stated in my dissenting opinions in *West India Fruit and Steamship Company*, 130 NLRB No. 46, and *Hamilton Bros., Inc.*, 133 NLRB No. 85, I would dismiss the petition herein.

Dated: Washington, D. C.
November 15, 1961

PHILIP RAY RODGERS, Member
NATIONAL LABOR RELATIONS BOARD

APPENDIX F.

LABOR MANAGEMENT RELATIONS ACT, 1947, AS AMENDED

61 Stat. 136 (1947), 29 U. S. C. §§ 141-187

Section 152 [July 5, 1935, c. 372, §2, 49 Stat. 450; June 23, 1947, 3:17 p.m., E.D.T., c. 120, Title I, §101, 61 Stat. 137]:

(6) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

(7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

EXHIBIT G

Complaint Without Exhibits.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

EMPRESA HONDURENA DE VAPORES, S. A., Plaintiff, *against* IVAN C. McLEOD, Regional Director for the Second Region of the National Labor Relations Board, Defendant.	COMPLAINT.

Plaintiff by its attorneys, White & Case, alleges upon information and belief:

1. The jurisdiction of this court is invoked under sections 1331 and 1337 of Title 28 of the United States Code.

The matter in controversy arises under the Constitution, the laws and a treaty of the United States hereinafter referred to and the matter in controversy exceeds the value of $10,000.00, exclusive of interest and costs.

2. Plaintiff is a corporation duly organized in 1941 under the laws of the Republic of Honduras, with its principal office and place of business at Puerto Cortes, Honduras. Its principal business is owning and/or operating 13 seagoing vessels which are registered under the laws of Honduras, fly the Honduran flag, are manned by unlicensed seamen employed in Honduras by plaintiff under Shipping Articles executed in Honduras. All but one of said seamen

are citizens of Honduras and he is a subject of Great Britain.

3. Defendant is the Regional Director for the Second Region of the National Labor Relations Board created by Congress under Article 1 section 8 of the Constitution of the United States.

Said Second Region includes the County of New York, within the Southern District of New York.

Said defendant is charged with the responsibility of carrying out the orders of the National Labor Relations Board, pursuant to the Labor Management Relations Act, Chapter 7 of Title 29 of the United States Code.

4. On November 15, 1961 the National Labor Relations Board (the "Board") rendered its Decision and Direction of Election in Case No. 2-RC-10739, United Fruit Company and National Maritime Union of America, AFL-CIO, in which proceeding the National Maritime Union of America, AFL-CIO, petitioned for an election among the unlicensed seamen employed on vessels owned and or operated by plaintiff and time chartered to United Fruit Company. Plaintiff intervened as a party on the ground that it was the sole employer of said seamen. Said Decision and Direction of Election directed an election by secret ballot to be conducted by defendant among said employees. A copy of this Decision and Direction of Election as corrected and amended by the Board is attached as Exhibit 1.

5. On or about November 22, 1961, plaintiff's attorneys received a communication dated November 21, 1961 from the office of defendant, copy of which is attached as exhibit 2, informing plaintiff that a pre-election conference was to be held at the office of the Board, Second Region, 745 Fifth Avenue, New York, N. Y., on December 1, 1961 relating to the conduct of the election.

Such pre-election conference held on December 1, 1961 was adjourned until December 11, 1961. On December 11, 1961 plaintiff was informed that defendant would issue a notice on December 12, 1961 of the dates and times and the manner of the conduct of the elections to be held pursuant to the order of the Board among said employees of plaintiff. Defendant informed plaintiff that the election is scheduled to take place on December 17, 1961 on board vessels owned and or operated by plaintiff upon their arrival in ports of the United States between December 17, 1961 and January 31, 1962 and by mailing ballots to said employees not aboard vessels scheduled to call at said United States ports between said dates.

6. Plaintiff is a wholly owned subsidiary of United Fruit Company, a New Jersey corporation. None of its officers or directors is employed by or associated with United Fruit Company and since its formation in 1941 all of its officers and directors have resided in Honduras.

7. Plaintiff owns ten of the seagoing vessels which it operates. It acts as agent for Balboa Shipping Company Inc., a Panamanian subsidiary of United Fruit Company, in the management and operation of three additional vessels which are owned by Balboa Shipping Company Inc. These thirteen vessels (the "Vessels") are presently time chartered to United Fruit Company and call at various ports in Central and South America, the United States, Canada and Europe. All of them call regularly at Honduran ports for trade and renewal of Ship's Articles.

8. The Vessels are registered under the Honduran flag. Plaintiff has never owned or operated American flag ships.

9. The Republic of Honduras has a long established and comprehensive system of laws and regulations governing all aspects of the ownership and operation of vessels

registered in Honduras and the employment of personnel thereon. Plaintiff is required to and does comply with these laws and regulations.

a. Each such vessel is required to carry on board a "Patente Definitiva de Navegacion" ("Patente") issued by the Republic of Honduras under signature of the Port Commandante of its home port (Puerto Cortes or Tela) evidencing ownership of said vessel. Such ownership is also inscribed in the Registry of Sea-going Vessels maintained by the Port Commandante.

Prior to the issuance of each Patente the owner must file in accordance with the requirements of the laws of the Republic of Honduras an application with the Republic of Honduras at Tegucigalpa enclosing with the application the bill of sale proving ownership of the vessel and must comply with certain other requirements under Title 2, Ley Organica de la Marina Mercante Nacional (1943).

b. Each such vessel is required to carry on board a safety equipment certificate issued by the Republic of Honduras, a navigation license, navigation log, crew roll, cash book, cargo book, compass log, tonnage certificate, load line certificate, charter party and a copy of the Commercial Code of Honduras and, if it carries radio equipment, the ship's station must be licensed by the Republic of Honduras and employ call letters and frequencies assigned by the Republic.

c. The officer personnel employed aboard such vessels must be licensed by the Honduran Government.

d. All unlicensed seamen in order to secure employment on such vessels of Honduran Registry are required to furnish a birth certificate, a Honduran passport, a Honduran seaman's identification book, the issuance of which is governed by Articles 56-64 of the Honduran Merchant Marine Act, a certificate of military inscription and a vaccination certificate. All unlicensed seamen are required to undergo

physical examination by a physician and must secure a medical certificate signed by this physician and a Honduran health official.

e. Each such seaman is required before he leaves Honduras to sign the Ship's Articles maintained in accordance with Article 24 of the Honduran Merchant Marine Act which lists the name of each seaman, his age, marital status, place of birth, nationality, domicile and name and address of next of kin. The Ship's Articles are certified by the Port Commandante in Honduras.

10. Plaintiff employs approximately 335 unlicensed seamen upon the Vessels. All but one of these unlicensed seamen are citizens of the Republic of Honduras. The one non-Honduran citizen is a Jamaican and a subject of Great Britain. With four possible exceptions, all of the unlicensed seamen are residents of the Republic of Honduras.

11. United Fruit Company has no employer relationship whatever with any employee of plaintiff including seamen employees. Plaintiff has the sole and exclusive authority and control over all matters concerning terms and conditions of employment including hiring, firing, wages and discipline of employees.

12. Since 1941 the unlicensed seamen employed by plaintiff have been represented by Sociedad Nacional de Marineros de Honduras, a Honduran labor union recognized by the Republic of Honduras, as their collective bargaining agent. Collective bargaining agreements have been entered into between plaintiff and this collective bargaining agent since 1942. The agreement now in effect is dated March 29, 1957. With certain adjustments as to wages and related matters, this contract has been in effect at all times since said date and has been renewed by its terms until February 15, 1963. A copy and translation are attached as Exhibit 3.

All of said unlicensed seamen are members of Sociedad (the Union) in accordance with paragraph 3 of said agreement.

13. Under Honduran law plaintiff is required to recognize the Union as the exclusive bargaining agent of its unlicensed seamen..

Labor grievances concerning the unlicensed seamen employed by plaintiff are handled by representatives of plaintiff and the Union, including referral of such grievances to the Public Solicitor of the Ministry of Labor, the Labor Courts and to the Minister of Labor of Honduras.

14. Furthermore, under the laws of Honduras, the petitioner in Case No. 2-RC-10739, National Maritime Union of America, AFL-CIO, (NMU) cannot gain recognition by the Honduran Government and could not lawfully represent plaintiff's said employees. Articles 490 and 504 of the Honduran Labor Code provide in translation as follows;

> "Article 490: No union may be permitted to act as such nor to exercise the functions prescribed to it by law or by its respective by-laws, nor to exercise its rights so long as it does not have recognition of its juridic personality, and may act as such only during the time it is so recognized.
>
> Article 504: "No union may function whose personnel is not composed of at least ninety per cent (90%) of Honduran citizens. No matter what is the form of direction of the union, no alien is eligible for directive posts."

NMU does not have Honduran recognition of its juridic personality nor are at least 90% of its personnel Honduran citizens.

15. Finally, plaintiff has received from the Government of Honduras an official ruling of its Ministry of Labor

to the effect that the action of the Board in this case, in assuming jurisdiction over the plaintiff and its unlicensed seamen and in directing the election, is a violation of the sovereignty of the Republic of Honduras and null and void under its law. A translation of the said ruling is attached as Exhibit 4.

16. The Board had no jurisdiction to direct defendant to conduct an election among said employees of plaintiff and in so directing acted in excess of its powers. The Supreme Court of the United States held in *Benz* v. *Compania Naviera Hidalgo, S. A.*, 353 U. S. 138 (1957), that the Labor Management Relations Act of 1947 (Chapter 7, Title 29 of the United States Code) does not apply to labor relations between nationals of foreign countries operating vessels under foreign laws and their foreign workers.

17. In its Decision and Direction of Election the Board acted in violation of the Constitution of the United States.

a. Such action violates Article VI of the Constitution in contravening the provisions of the Treaty of Friendship, Commerce and Consular Rights between the United States of America and the Republic of Honduras dated December 7, 1927, 45 Stat. 2618 (1927). Article 16 of this treaty provides:

> "Merchant vessels and other privately owned vessels under the flag of either of the High Contracting Parties and carrying the papers required by its national laws in proof of nationality shall, both within the territorial waters of the other High Contracting Party and on the high seas, be deemed to be the vessel of the Party whose flag is flown."

b. Such action is in disregard of the principles of international law recognized and adhered to by the Depart-

ment of State and violates Article II, section 2 of the Constitution by infringing upon the functions and powers granted to the Executive Department of the United States Government to conduct the foreign affairs of the United States.

c. Such action violates Article I, section 8 of the Constitution by exceeding powers granted to Congress thereunder, and

d. Such action violates Amendment V to the Constitution by depriving plaintiff of its "liberty, or property, without due process of law", in that it deprives plaintiff, a citizen of the Republic of Honduras, of its liberty to contract and, furthermore, impairs its rights under the existing collective bargaining agreement with the Union.

18. Plaintiff will suffer immediate and irreparable damage unless defendant, his agents, servants, employees, attorneys and all persons acting for and in concert with him are enjoined from conducting an election among the seamen employees of plaintiff in the following respects, among others:

a. Plaintiff will be denied the protection and rights granted to it under the laws and Constitution of the United States;

b. Plaintiff will be caused to violate its existing collective bargaining agreement with the Union and may be subjected to damages and other sanctions as a consequence thereof;

c. Plaintiff will be caused to violate the Honduran law requiring it to recognize the Union as the exclusive bargaining agent of plaintiff's seamen employees and may thereby be subjected to penalties and other sanctions under Honduran law; and

d. The operation of the Vessels will be impaired and plaintiff's relations with its seamen employees seriously

disturbed and disrupted, all to plaintiff's loss and economic disadvantage.

19. Plaintiff has no adequate remedy at law.

WHEREFORE, plaintiff prays judgment permanently enjoining the defendant, his agents, servants, employees, attorneys and all persons acting in concert with him from carrying out the Board's aforesaid Decision and Direction of Election dated November 15, 1961 and from conducting an election among plaintiff's said employees and granting such other and further relief as may be just and proper.

And plaintiff prays that an order be made temporarily enjoining during the pendency of this action the carrying out of the aforesaid Decision and Direction of Election and the holding of an election thereunder.

Dated: December 12, 1961

WHITE & CASE

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